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PRINCIPLES  
OF  
PENAL LAW.



PRINCIPLES

OF

PENAL LAW.

PRINCIPLES

By James Fitzjames Stephen, Esq., M.A., of the Inner Temple, Esquire-at-Law.  
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THE THIRD EDITION.

L O N D O N.

PRINTED FOR R. WHITE, IN FLEET STREET,  
AND T. CADELL, IN THE STRAND.

MDCCLXXXV.

# PRINCIPLES

OF

# PENAL LAW.

by  
W. Eden. (See Clarke B. 5. Aug 1819  
p. 111)

*Vestram nemo est, quin intelligat, Populum, qui quondam in hostes lenissimus existimabatur, hoc tempore domesticâ crudelitate laborare. Hanc tollite ex civitate, Judices; hanc pati nolite diutius in hac Republicâ versari: quæ non modò id habet in se mali, quòd tot cives atrocissimè sustulit, verum etiam hominibus lenissimis ademit misericordiam consuetudine incommo-  
dorum. Nam cum omnibus horis aliquid atrociter fieri videmus aut audimus: etiam qui naturâ mitissimi sumus, assidue molestarum sensum omnem humanitatis ex animis amittimus.*

Cic. pro S. R. Amer, § 53.

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PRINTED FOR B. WHITE, IN FLEET-STREET;  
AND T. CADELL, IN THE STRAND.

MDCCCLXXV.

THE COMPANION  
TO THE NEW EDITION

Of the punishment of murder.  
Of the punishment of manslaughter.  
Of the punishment of robbery.  
Of the punishment of burglary.  
Of the punishment of larceny.  
Of the punishment of fraud.  
Of the punishment of perjury.  
Of the punishment of false witness.  
Of the punishment of false oath.  
Of the punishment of false statement.

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PENAL LAW.



Of the punishment of the law of God.  
Of the punishment of the law of man.  
Of the punishment of the law of nature.

Of the punishment of the law of God.  
Of the punishment of the law of man.  
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Of the punishment of the law of God.  
Of the punishment of the law of man.  
Of the punishment of the law of nature.

THE THIRD EDITION.

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MDCCLXXIV.



[ v ]

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THE CONSTITUTION

OF THE UNITED STATES

OF AMERICA

BY JAMES MADISON

AND



IN TWO VOLUMES

CHAPTER I

OF THE LEGISLATIVE POWER

THE first foundation of society is the right of the people to elect their representatives. The progress of civilization is the foundation of legislative power. In the establishment of the government, the first step is to establish the legislative power. The first step is to establish the legislative power. The first step is to establish the legislative power.

CHAPTER II



# PRINCIPLES

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### CHAP. I.

#### *Of the Origin of Legislation.*

§ 1. **T**HE mutual dependence of mankind upon each other is necessary to their mutual preservation; and the consciousness of this necessity is, in the first formation of societies, the instinctive principle of union. But reason, co-operating with instinct, carries the association still further, and points out the insufficiency of a state merely gregarious. The unlimited enjoyments of Individuals are found incompatible with the existence of a collective Body; rules of conduct and covenants are introduced; and the moral duties of benevolence, justice, and adherence to compacts, become

become as evident to human understanding, as they are essential to human happiness.

Here then commences the obligation of civil laws: the impulses of appetite cease to be the sole motives of action; power is no longer the measure of property; and the natural herd is refined into a political government. Legislation is instituted; and the baneful excesses of the passions are subjected to various modifications of restraint. Magistracies are established; and the promulgation of punishments is extended to All, by the common consent of All, for the benefit of All.

And thus it is, that the system of civil liberty is established on the aggregate of those portions of natural liberty, which are given up by the constituent members of society. But it is not to be supposed, that this effect is instantaneous: I shall hereafter have occasion to shew, that the infancy of civilization is tedious, and its progress towards maturity subjected to many difficulties. The gratification of private resentment, and the pursuit of private satisfaction, are at first the sole objects of criminal process; and the of-  
fended



## OF PENAL LAW. 3

defended party is his own avenger. It is long, before the selfish passions are softened into an habitual acquiescence in the general dispensations of Law; before injuries to individuals are considered, and made punishable, as injuries to the society at large. This change, in which the public interest is recognized to be the great end of penal jurisdiction, though founded in reason, is contradictory to the most active propensities of human nature, and therefore is submitted to with reluctance.

It is from this assumed period of improved civilization that I am now to proceed.

§ 2. To what extent the authority of legislative regulations may be carried, and how far the obedience of the subject is demandable, are questions of speculation, which the temperate disposition of modern governments hath rendered rather curious than useful. It is sufficient to observe, that every causeless or unnecessary restraint of the Will is an infringement of that political freedom, to which every member of society is entitled; and possible cases may certainly be proposed, which no authority on earth can justify.



*Phalaris licet imperet, ut sis  
Falsus, et admoto dicet perjuria tauro.  
Summum crede nefas animam præferre pudori,  
Et propter vitam vivendi perdere causas.*

The accomplished Athenians enacted, that in sieges the aged and infirm should be put to death: an Englishman would not think himself compellable by any Law to plunge the poniard into the bosom of his helpless Father. The same Athenians, in the height of the most refined effeminacy, considered the Exposition of their children as a practice justifiable, and blameless; and Solon, the most celebrated of the Sages of Greece, gave to it the sacred permission of law. Among the Spartans this unnatural species of murder was conducted by a state-committee, appointed to determine, whether the child were proper to be reared, as likely to become useful to the community; or to be deserted, as of an infirm, and unpromising constitution. Vain were the smiles of innocence, and the cries of helplessness. Custom had murdered natural

Juv. viii. 81.

The force of habitual prejudices, is wonderful; a truth, which will frequently recur to the Reader in the course of the following enquiry. Plutarch, the humane, good-natured Plutarch, recommends it as a virtue in Attalus, that he exposed all his own children, in order to leave the

CROWN

## OF PENAL LAW. 3

tural affection; and the Babe was abandoned by its Parents to the Mercy of Wolves and Bears. The hearts of modern mothers bleed at the idea,

§ 3. As to the more confined questions? To what degree punishments may be carried; or, How far a Man may subject himself and his fellow-citizens to the infliction of pains, the loss of honors and property, the horrors of imprisonment, and the deprivation of life? the answer may in some measure be collected from those writings of Divine authority, to which I shall hereafter refer: At present it may be sufficient to appeal to the unwritten law of God imprinted on the heart of Man; to that natural sympathy better felt than expressed, which forbids us to give unnecessary

crown to the son of his brother Eumenes; signalizing in this manner his gratitude and affection to Eumenes, who had left him his heir in preference to that son.

Perhaps (says Mr. Hume) by an odd connection of causes, this barbarous custom might contribute to render those times more populous. By removing the terrors of too numerous a family it would engage many people in marriage; and such is the force of natural affection, that very few in comparison would have resolution enough, when it came to the point, to carry into execution their former intentions. China, where this practice still prevails, is the most populous country that we know.

Essays, 4<sup>to</sup>, p. 218.

## OF PENAL LAWS 6. PRINCIPLES

Pain to each other; or, in fuller words, to extend the severity of punishments beyond what is essentially necessary to the preservation and morality of society; general terms, of which a definition will result from the subsequent detail.

State-punishments are to be considered then as founded on, and limited by, first, natural Justice; secondly, public Utility; and it will be shewn, that, in the pursuit of those great ends, Wisdom and Mercy should go hand in hand.

## CHAP. II.

### *Of penal Laws.*

V § 1. **T**HE prevention of crimes should be the great object of the Law-giver; whose duty it is, to have a severe eye upon the offence, but a merciful inclination towards the offender. It is from an abuse of language, that we apply the word "Punishment" to human institutions: Vengeance belongeth not to man. Criminals, said Plato,

\* De Legibus, p. 977;

are



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are punished, not because they have offended; for what is done can never be undone: but that for the future the criminals themselves, and such as see their punishment, may take warning, and learn to shun the allurements of vice. “*Meti Suffeti, inquit Tullus, si ipse* “*discere posses foedera ac fidem servare, vivo* “*tibi ea disciplina a me adhibita esset: nunc,* “*quoniam, tuum insanabile ingenium est, Tu tuo* “*supplicio doce humanum genus ea sancta cre-* “*dere, quæ a te violata sunt.*” It is the end then of penal laws to deter, not to punish.

§ 2. But let not for this purpose the severity of the penalty be augmented in proportion to the increase of the temptation; which is a cruel and mistaken policy.

“*Qui vi rapuit, fur improbius videtur.*”

Such was the maxim of the Roman law, which punished the open, daring thief with whipping, and the pilferer by fine only. The English law, adopting a less equitable idea, hath made it death to take privately from the pocket a handkerchief, or other thing of the value of twelvepence; but any Larceny

Law, Stat. 1, c. 28.

ff. 4. 2. 14. 12.

8 Eliz. c. 4.

B. 4

(below

## § WPRI NCIPLES

(below the degree of robbery by putting in fear) committed openly, and avowedly on the person, to any extent; and even in a dwelling-house or out-house, under the value of forty shillings, is within the benefit of clergy.

Under the same perversion of distributive justice it is made only a transportable offence, "to assault another with an offensive weapon, or by menaces, demanding money, goods or chattels, with a felonious intent to rob;" whereas by another statute it is, death without benefit of clergy, merely to write an anonymous Letter, signed with a fictitious name, demanding money, venison, or other valuable thing."

§ 3. The punishment should be proportioned to the flagitiousness of the crime; but the flagitiousness of the crime diminishes in proportion to the facility, with which it may be committed\*: for that facility in general constitutes the degree of the temptation.

Were  
\* 1 Hawk. P. C. p. 97.  
7 Geo. II. c. 21. 9 Geo. I. c. 22.

By the flagitiousness of a crime, I mean its abstract nature and turpitude, in proportion to which the criminal should be considered as more or less dangerous to society. And surely, in the eye of the Lawgiver, who as a  
Man

Were I to leave the support of this position to the internal evidence of its own truth, or to the mere unassisted dictates of moral sentiment, it might appear perhaps presumptuous; because contradictory to the most ingenious and elegant writer on the law of England.

"The severity of our law in certain instances (says that writer) seems to be owing to the ease with which such offences are committed." Again—"It is but reasonable, that, among crimes of equal malignity, those should be most severely punished, which a man has the most frequent, and easy opportunities of committing; which cannot be so easily guarded against as others; and which therefore the offender has the strongest inducement to commit: accord-

Man must make allowances for the imbecillities of mankind, the abstract turpitude of the offence decreases in proportion to the inducements which naturally influence the mind of the offender.

*C'est le triomphe de la Liberté, lorsque les loix criminelles tirent chaque peine de la nature du crime: tout l'arbitraire cesse; la peine ne descend point du caprice du législateur, mais de la nature de la chose; et ce n'est pas l'homme qui fait violence à l'homme.*

*L'Esprit des Loix, xii. 4.*

See the Commentaries on the Laws of England, b. iv. p. 247.

ib. b. iv. p. 16.

"ing



ing to what Cicero observes, *ea sunt animadvertenda peccata maxime, quae difficillime praeveniantur.* He then proceeds to several Examples, on which it may be sufficient to observe, that when "it is made capital for a servant to rob his master" in certain cases, which extend not to a stranger committing the same offence against indifferent persons; and, when "it is a species of treason for a servant to kill his master, or for a wife to kill her husband, which act in others is only murder;" we are not in those cases to suppose the frequent opportunities of perpetrating the offence to have excited the peculiar severity of the law. The malignity of the fact is the true measure of the penalty; and that malignity is in these cases aggravated by the gross breach and flagrant abuse of domestic confidence. Cicero has certainly said,

*quod*  
Orat. pro Sexto Roscio, c. 40.  
Commune est hoc malum, communis metus, commune periculum. Nullae sunt occultiores insidiae, quam eae quae latent in simulatione officii, aut in aliquo necessitudinis nomine. Idem enim, qui palam est adversarius, facile cavendo vitare possis. Hoc vero occultum, intestinum, ac domesticum malum, non modo non existis, verum etiam opprimis, antequam prospicere atque explorare poteris.

Cic. in Verrem, II. l. i. c. 15.  
Upon this principle, by a declaration of Lewis the XVth, A. D. 1724, Le vol domestique sera puni de mort,

This

## OF PENAL LAW. II

quod ea sunt animadvertenda peccata maxime, quæ difficillime præcaventur: but the learned Commentator should have cited also the context, which supports the very principle for which I contend; "*ad cuius enim fidem alius quis confugiet, cum per ejus fidem læditur cui se commiserit? recte esse ad alienos possumus, locum cavere qui possumus? quem etiam offe- metuimus, jus officii lædimus:—Nam neque mandat quisquam fere nisi amico: neque credit nisi ei quem fidelem putat. Perditissimi est igitur hominis, simul et amicitiam diffolvere, et fallere eum, qui læsus non esset, nisi credi- disse;*"

§ 4. From these positions, "that the penalty ought to be increased in proportion to the outrage of the crime," and, "not in proportion to the temptation which misleads the mind of the criminal;" I would by no means infer, "that the penal sanction relative to every particular offence should be mitigated in proportion to the facility with which that offence may be committed."

This was only the renewal of a very ancient Law made by Lewis the IXth, A. D. 1270, which considers this offence as a species of treason. "*Hors, quand il emble a son Baillour, et il est a son pain et a son vin, il est pendable; car c'est maniere de trahison.*" Code penal, 103.

Political wisdom is the result of experience, rather than of theory. And the history of every state will shew to us, that in some cases the emergencies of society make it expedient to place great severities in opposition to the strongest temptations; that in others it is necessary to punish the offence without any research into its motives; and that in every case it is impracticable for Law-givers to assume the divine attribute of animadverting on the fact, only according to the internal malice of the intention.

The safety of the Public is the supreme law of policy: and when Legislature is thus necessitated in any degree to deviate from the principles of justice and humanity, we must submit to the deviation merely as to an occasional result from the imperfections of our nature. But the principles of justice and humanity are unchangeable: and to those principles I appeal, when I controvert the position, "that among crimes of equal malignity, those should be most severely punished which the offender has the strongest inducement to commit." A position which, if generally established, would lead to sanguinary and cruel consequences.

§ 5. "That



## OF PENAL LAW. 13

§ 5. "That Legislature may justify the infliction of whatever degree of severity is necessary for the prevention of any particular crime;" is also a position, which, when offered without limitation, I conceive to be both morally and politically false. It is a pretence, which, if once suffered to hurry us beyond the bounds of humanity, is subject to no other restraint.

§ 6. When the rights of human nature are not respected, those of the citizen are gradually disregarded. Those aeras are in history found fatal to Liberty, in which cruel punishments predominate. Lenity should be the guardian of moderate governments: severe penalties, the instruments of despotism, may give a sudden check to temporary evils; but they have a tendency to extend themselves to every class of crimes, and their frequency hardens the sentiment of the people. *Une loi rigoureuse produit des crimes.* The excess of the penalty flatters the imagination with the hope of impunity; and thus becomes an advocate with the offender for the perpetrating of the offence.

The

The convicts, who have stolen cloth from the renters, sustenance from the bleaching ground, or a lamb from their landlord's pasture, knew the law to have assigned death, without the benefit of clergy, to each of their offences: but, in the depth of ignorance and profligacy, mere instinct informed them, that common humanity would recoil at the idea, and they relied for their security on the ingenuity of mercy to evade the law.

§ 7. Legislators should then remember, that the acerbity of justice deadens its execution; and that the increase of human corruptions proceeds, not from the moderation of punishments, but from the impunity of criminals.

§ 8. In the promulgation of every new offence, let the lawgiver expose himself to feel what wretches feel; and let him not seem to bear hardest on those crimes, which, in his elevated station, he is least likely to commit. "Si les supplices en usage dans presque tout l'orient sont horreurs à l'hu-  
manité,"

22 Car. II. c. 25. § 3.  
4 Geo. c. 16. and 18 Geo. II. c. 19.  
De l'Esprit, t. ii. p. 68.

"nité,

monité, c'est que le Déspote, qui les ordonne, se sent au dessus des loix. Il n'en est pas ainsi dans les republicques; les loix sont toujours douces, parce que celui qui les établit, s'y soumet." If this reasoning be founded in truth, it furnishes a mortifying inference, that men are naturally cruel, when they can be so with safety.

§ 9. Penal laws are to check the arm of wickedness; but not to wage war with the natural sentiments of the heart.

Contrary to this principle is the statute, which, making the concealment of infamy evidence

\* 21 James I. c. 27. which recites, "That women, delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury, and conceal the death of their children, alledging, if the child or children be afterwards found, that they were born dead; whereas it falleth out sometimes (although hardly it is to be proved) that the said children were murdered by the said women." For the prevention of this mischief, it is hereby enacted, "That in every case the said mother so offending shall suffer death as in case of murder, except such mother can make proof by one witness at the least, that the child, whose death was by her so intended to be concealed, was born dead."

The modern exposition of this statute is a good instance, that cruel laws have a natural tendency to their own dissolution in the abhorrence of mankind. It is now the constant practice of the courts to require, that the body of the



evidence of murder, compels unhappy women to break through the becoming pride and modesty of their sex, and to be the first officious publishers of their own shame. Harsh is the construction of treasons", which subjects

the child shall be found, before any conviction can take place; and, if it should happen, that the mother had any child-bed linen, or other preparatives in her possession, prior to her delivery, it is generally admitted as a proof, that no concealment was intended. Moreover, it is not unusual to require some degree of evidence that the child was actually born alive, before the ungenerous presumption, that the mother was the wilful author of the death of her new-born infant, is permitted to affect her. These humane deviations from the harsh injunction of the statute have nearly amounted to a tacit abrogation of it.

The expressions of the Swedish Law on this subject are very severe—"Mulier impudica, quæ ex illegitimo concubitu uterum gestat, nec hoc ante partum aperit, latebras quærens quo furtim enitatur partum, et deinde abscondit, percutiatur securi, et in pegmate comburatur, non attento prætextu mortuum vel ante justum terminum editum fuisse."

There is a law to the same purport in France; which may also be found in the "Observations on the ancient statutes," p. 425; and I find that it is strictly enjoined by an ordinance of Henry III. and by a declaration of Lewis XIV. to be published once in every three months in all the parish churches.

Code penal. Paris, 1755. 8vo. titre 29.

\* A. D. 1689, Lady Lisle and Mrs. Gaunt were convicted of high treason, and executed: the former for harbouring a dissenting priest, who had been concerned in the Duke of Monmouth's rebellion; the latter for giving refuge to another rebel, on whose evidence, voluntarily offered, the conviction was grounded. The man was pardoned

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jects to that sentence full of horrors the son, husband, and father, for the protection given to the wife, parent, and child.

The laws of Japan oblige the person accused to give an answer to the accusation; if his answer be false, he is punished with death. This is a violation of the first principle of self-preservation.

§ 10. It is one of the unavoidable imperfections of legislatures, that they are necessitated to assign the same name and penalty to whole classes of crimes, each of which differs from the other by an infinite variety of unsearchable circumstances. Yet some offences are so intimately, and so undistinguishably classed in their nature, that it is difficult to conceive any possible reason for a diversity in their punishment.

done for his treachery; she was burned alive for her charity.

I make no observations on their respective trials; because the proceedings of our criminal courts, at this era, are so disgraceful, not only to the nation, but to human nature, that, as they cannot be disbelieved, I wish them to be buried in oblivion.

See Hume's Hist. vi. 385.—Burnet i. 649.

It seems a strange incongruity, that the offence of counterfeiting foreign coin legitimated by proclamation, should work a corruption of blood; which is saved by special proviso in the offence of counterfeiting the current coin of the kingdom. Again, it is a clergyable felony by our law to destroy or damage the bridges of Brentford or Blackfriars: but it is death to commit the same offence on the bridges of London, Westminster, or Putney. There is a similar unaccountable distinction between prison-breakers convicted of perjury, or committed for entering black-lead mines with intent to steal; and such as are convicted of, or committed for, any other offence within clergy. God forbid, that I should insinuate a necessity to drag all this variety of discordant instances to the same bloody line of uniformity! Their cruelty appears to me equal to their inconsistency; and it would not perhaps be difficult to prove their folly equal to their cruelty.

VIX. c. 20. p. 23. see the declaration of Lewis XI.  
 § 11. Laws made on the spur of the occasion, should have a short and limited dura-

\* Foster, p. 246.

\* 5 Eliz. c. 11. and 8 & 9 W. III. c. 29, &c.

\* 2 Geo. II. c. 25. § 2.

\* 25 Geo. II. c. 10.

tion ;



tion; otherwise in the course of years it will be said, "*magis seculum suum sapiunt, quam rectam rationem.*"

It is still a Felony to steal a hawk, and death to associate one month with Egyptians, or to wander, being a soldier or mariner, without a testimonial under the hand of a Justice.

§ 12. Obsolete and useless statutes should be repealed; for they debilitate the authority of such as still exist and are necessary. Neglect on this point is well compared by Lord Bacon to the cruelty of Mezentius, who left the living to perish in the arms of the dead.

Persons carrying subjects out of the northern counties, or giving black mail for protection, Jailers forcing prisoners to become approvers, Malons confederating to prevent the statutes of labourers, Purveyors in certain cases

<sup>a</sup> 5 Eliz. c. 20. p. 23. See the declaration of Lewis XIV. contre les Bohémiens, et ceux qui leur donnent retraite.

<sup>b</sup> 39 Eliz. c. 17. <sup>c</sup> 43 Eliz. c. 13. <sup>d</sup> 14 Ed. III. c. 10. <sup>e</sup> 3 Hen. VI. c. 1. <sup>f</sup> 28 Ed. I. Stat. iii. c. 1.

though purveyance is abolished, are all capital offenders: and none shall bring pollardz and crockardz (which were foreign coins of base metal) into the realm, on pain of forfeiture of life and goods. The alterations in our government have rendered these particular provisions totally ineffective; but there are other obsolete statutes, which exist, the possible instruments of mischief in the hand of tyranny.

§ 13. Civil and criminal laws must accumulate, and become complicated, in proportion to the increased riches of the state, and to the security given to the liberties, lives, honours, and properties of the people. Despotic states admit a simplicity of legislation, the forms and principles of which depend on the caprices of a weak and ignorant Monarch, whose breast is the repository of precedents: but it should be the primary object of free governments, to have the outlines of their privileges fixed and determinate. When the laws for this purpose are explicit, it is the duty of the Judge strictly to conform to them; when they are otherwise, it is the immediate duty of the Legislator to ascertain them.

It is not therefore sufficient, that the decision of the fact be guarded from the influence of fear and affection: the adjudication of the law should be a certain consequence of that decision. But, when the penalty prescribed bears an evident and excessive disproportion to the offence, the humanity of the Judges will be interested in the evasion of it, "*et magis valebunt acumina ingeniorum, quam auctoritas legis*." And this is a consideration, which, exclusive of every motive of humanity, should induce the lawgiver carefully to discuss the different modes of punishment, as applicable to the different degrees of moral and political guilt.

### CHAP. III.

#### *Of the Infliction of Death.*

§. I. It is impossible to read the histories of executive justice in different governments without shuddering at the very idea of those miseries, which men, with unrelenting ingenuity, have devised for each

Bac. de Augm. Scient.



other. In some countries it hath been usual to sew up criminals in the warm skins of beasts, and in this condition to expose them to wild dogs; in others the limbs are torn asunder by horses; in others recourse is had to crucifixions, burnings, boilings, slayings, famishings, impalements, and other modes of destruction, equally shocking to decency and humanity.

"Merciful, heaven!

"Thou rather with thy sharp and sulphurous bolt  
 "Split'st the unwedgeable and gnarled oak,  
 "Than the soft myrtle: O but man, proud man,  
 "Drest in a little brief authority,  
 "(Most ignorant of what he's most assur'd,  
 "His glassy essence) like an angry ape,  
 "Plays such fantastic tricks before high heaven  
 "As make the angels weep!"

§ 12. This imputation of tyranny and cruelty hath at different periods been applicable to every government, of which we have any authentic history. Livy, in respect to his countrymen, hath endeavoured to establish a different inference in his account of the punishment of Metius Suffetius; *Exinde, quibus admotis quadrigis, in currus earum*  
 Shakespeare, Meal. for Meal. L. i. c. 28.

"*disfentus*

“*disfentus illigatur Metius; deinde in diversum  
“ iter equi concitati, lacerum in utroque curru  
“ corpus, quod inhæserant vinculis membra, por-  
“ tantes. Avertere omnes a tanta fœditate  
“ spectaculi oculos. Primum, ultimumque illud  
“ supplicium apud Romanos exempli parum me-  
“ mors legum humanarum fuit; in animis gloriari  
“ licet, nulli gentium mitiores placuisse pœnas.”*

We know that national benevolence ought to be the concomitant of national liberty, and are therefore inclinable to give credit to this assertion; but it will not be found in any degree reconcileable to the united testimony of many other Historians. The modes of capital punishment, used by the Romans, were at least as numerous, and as exceptionable, as those of other nations. The head of the malefactor was in some cases fastened within the furca, and in this attitude he was whipped to death<sup>1</sup>; and this was distinguished by the name of *supplicium more majorum*. In other

<sup>1</sup> C. C. Caligula, curatorem munerum ac venationum, per continuos dies in conspectu suo catomis verberatum, non prius occidit, quam offensus putrefacti cerebri odore.

Sueton. in vitâ Calig. c. 27.  
<sup>2</sup> Codicillas præcipuit Nero, legitque se hostem a senatu judicatum, et quæsi ut puniatur more majorum: interrogavitque quid esset id genus pœnæ. Et cum comperisset, nudi hominis cervicem inferi furcæ, corpus virgis ad necem cædi; contritus ferrum jugulo adegit.

Sueton. in vitâ Neron. c. 49.  
C 4 cales,

cases, as in the execution of Antigonus, the whipping terminated in beheading<sup>a</sup>. Crucifixion or the *foetile supplicium*, was in use during many centuries, and first abrogated by Constantine; the sentence also inflicted whipping, "*verbera infra aut extra pomerium, arboris infelici suspendito*"<sup>b</sup>. The criminal was naked in the execution of these different punishments. Parricides<sup>c</sup> were sewed up in a leathern sack, with an ape, a cock, a serpent and a dog, and so cast into the sea. It was also usual to cover some offenders with a mantle dawbed over with pitch, and then to set fire to it; *Cogita*, inquit Seneca<sup>d</sup>, *illam tunicam alimentis ignem illatam et intexam*. The Emperors introduced a punishment called "*Seræ-diffectio*." *Damnatio in gladium*, or sentence to the public combats, and *damnatio ad bestias*<sup>e</sup>, were also frequent; and the latter appears to have been very fatal to offenders; "*præclara ædilitas!*" said Cicero, *unus Leo, ducenti Bestiarii*."

<sup>a</sup> Dion. l. xlix.

<sup>b</sup> Liv. l. i. & Val. Max. l. j. c. 7.

<sup>c</sup> *Cujus supplicio non debuit una parari*

<sup>d</sup> *Simia, nec serpens unus, nec culex unus.*

<sup>e</sup> See also, Dig. 48. ad Leg. Pomp. l. 3. Cic. Orat. pro Sext. Roscio.

<sup>f</sup> Ep. 14.

<sup>g</sup> Sueton. in vitâ Calig. c. 27.

<sup>h</sup> Dig. 48. 19. 11. 3.

These



## O F P E N A L L A W. 25

These cruelties were founded on the twelve tables of the Decemvirs, and were contrary to the republican spirit. Accordingly by the Porcian law, made in the 454<sup>th</sup> year of Rome, by Porcius Lecca the Tribune, it was ordained, that no citizen should be put to death. This exemption was in the extreme of lenity, and erroneous in its foundation. Capital executions are in all states necessary.

§ 3. Nothing, however, but the evident result of absolute necessity, can authorize the destruction of mankind by the hand of man.

The infliction of Death is not therefore to be considered, in any instance, as a mode of punishment, but *merely* as our last melancholy resource in the extermination of those from society, whose continuance among their fellow-citizens is become inconsistent with the public safety.

§ 4. We may pronounce it then contrary both to sentiment and morality, to aggravate capital executions by any circumstances of terror or pain beyond the sufferings inseparable from a violent death.

The

The punishment of the murderer after trial and conviction was by the Athenians left to the relations of the deceased, who might put him to death if they thought proper; but they were not permitted to use any degree of torture, or to extort money; Excellent restrictions! which taught the prosecutor to seek justice, not revenge; in wrath to remember mercy; and to feel less, what he in his own interests had suffered, than what the Offender was about to suffer.

It was a custom among the Jews to give wine mingled with myrrh to the malefactor at the time of his execution; in order, as it is said, to cause a stupor, and deaden the sensibility of the pain.

I transcribe the following passage from the English State-trials. "Hugh Peters, being carried on a sledge to the scaffold, was made

Demosthenes hath given a full explanation of this law, which ordered the murderer, if put to death, to be executed in the district, or parish of the deceased; *in lege duplicata degen.* *quibus verbis significatur, non licet flagrantem domi-* *cidam, vincire, laniare, lacerare, aut manus populari tem-* *perare, raptis armibus, &c."* Per. Lib. Ant. p. 611. Demosth. Orat. adv. Aristoc. p. 410.

to sit thereon within the rails, to behold the execution of Mr. Cook. When Mr. Cook was cut down, and brought to be quartered, Col. Turner ordered the Sheriff's men to bring Mr. Peters near, *that he might see it*; and bye and bye the hangman came to him, all besmeared in blood, and, rubbing his bloody hands together, he tauntingly asked, "Come how do you like this work, Mr. Peters? how do you like it?" He replied, "Friend, you do not well to trample on a dying Man."

Shall we plant thorns in the path of Misery? God forbid! Such refinements of inhumanity are admissible only in governments so abominable in their Constitution, as to make the mere loss of life desirable.

"This is not the only instance of ungenerous insults towards the Republican sufferers at the Restoration. "The Regicides" (says Bishop Burnet) had at that time been odious beyond expression, yet *the odiousness of the crime began to be much flattened by the frequent executions.*"

And therefore when Sir Henry Vane was brought to the scaffold, lest his words should leave impressions on the hearers to the disadvantage of the government, drummers were placed under the scaffold, who, as soon as he began to address the people, upon a sign given, struck up with their drums. After being thus repeatedly interrupted, and even when he was taking leave of his friends, he gave over, and died with so much composedness, that it was generally thought, that the Government had lost more than it had gained by his death." Vol. i. p. 164.



§ 5. Solemnity indeed is requisite, for the sake of example; but let not death be drawn into "lingering sufferance;" detain not the excruciated soul upon the verge of eternity. It was consistent only with the brutal infamy of Caligula to order the executioner to protract the death of the mangled criminal, *perpetuo, notoque jam præcepto, "Ita feri, ut se mori sentiat."*

§ 6. Lawgivers should remember, that they are, mediately, and in effect, the executioners of every fellow-citizen, who suffers death in consequence of any penal statute; and there are certain contrasted points of view, in which it may be of use to them to consider criminals at the approach of death.

"Master Barnardine, what ha! your friend the hangman! you must be so good, Sir, to rise, and be put to death. Pray, Master Barnardine, awake, till you are executed, and sleep afterwards."

The wretch, to whom this last summons is so ludicrously addressed, is represented to us, "as a man, that apprehends death no

"Shakespeare, *Meas. for Meas.* Act. iv. Sc. 3.

## OF PENAL LAW. 29

more dreadfully, but as a drunken dream; careless, reckless, and fearless of what's past, present, or to come.

The crimes of such a man may perhaps have made him unfit to live, but he is certainly unfit to die. The safety of the community, and the preservation of individuals, may call for his execution; but the bosom of humanity will heave in agony at the idea, the eye of religion will turn with horror from the spectacle.

Suppose the sufferer on the contrary, to have been a valuable member of society, and to have erred only from some momentary impulse of our imperfect nature; one, who in the recollection of reason hath found repentance; who resigns with cheerfulness that life, which is become a forfeiture to the law, and looks up in confidence to heaven for that forgiveness which is not to be found on earth. The last footsteps of such a man, are watered with the tears of his fellow-citizens; and we hear from the mouth of every spectator, "Yes! I do think that you might pardon him."

"And neither heaven, nor man grieve at the mercy."

CHAP.

## C H A P. IV.

## Of Banishment.

§ 1. **T**HE Romans permitted an accused Citizen, in every case before judgment to withdraw himself from the consequences of conviction into voluntary exile.

*“Exilium (inquit Cicero) non supplicium est, sed perfugium, portusque supplicii. Ita que nulla in lege nostra reperietur, ut apud cæteras civitates, maleficium ullum exilio esse multatum. Sed cum homines vincula, necesse, ignominiasque vitant, que sunt legibus confistuta; confugiunt, quasi ad aram, in exilium; qui, si in civitate legis vim subire vellent, non prius civitatem, quam vitam amitterent. Quia nolunt, non adimitur his civitas; sed ab his relinquitur atque deponitur.”*

§ 2. Transportation <sup>y</sup> was totally unknown to the common law of England; but the ancient

<sup>z</sup> Orat. pro A. Cæcin. c. 34.

<sup>y</sup> We may easily form a probable guess as to its first introduction into our laws; for, by stat. 39 Eliz. c. 4, it was enacted, “that dangerous rogues, and such as will not be reformed of their roguish course of life, may lawfully,



tient practice of abjuration of the realm bore a strong resemblance to the Roman institution. "This was permitted, says Sir E. Coke, "when the felon chose rather, *perdere patriam, quam vitam.*" The oath of perpe-

fully, by their Justices in the Quarter-sessions, be banished out of the realm, and all other the dominions thereof, into such parts beyond the seas as shall be for that purpose assigned by the Privy Council: or otherwise be adjudged perpetually to the Gallies of this Realm." And, further, every rogue, so banished, and returning without licence, was made guilty of felony, but within the benefit of Clergy. And, for the better indemnifying of such rogues so returning, it was also enacted, that, prior to their banishment, they should be "thoroughly burned upon the left shoulder with a hot-burning iron, of the breadth of an English shilling, with a great Roman R upon the iron, for a perpetual mark upon such rogue during his or her life." See Rastall's Statutes, p. 429.

But Transportation, more nearly as now practised, seems to have taken place about the time of the Restoration. For, saith L. C. J. Kelyng, p. 45, "Copeland (the prisoner) alledged, that he had done nothing but what he ought to do to serve his friend; and this favourable circumstance was allowed to be put into the King's pardon amongst those prisoners of that nature who were to be sent beyond the sea; it having been lately used, that, for felonies within clergy, if the prisoner desire it, not to give his book, but procure a conditional pardon from the King, and send him beyond sea to serve five years in some of the King's plantations, and then to have land there assigned to him, according to the use in those plantations for servants after their time expired; with a condition, in the pardon, to be void if they do not go, or if they return into England during seven years, or after, without the King's Licence."

tual

tual banishment was then administered to him by the Coroner in the church, or church-yard, to which he had fled; and a cross was delivered into his hand for his protection on his journey. This custom no longer subsists; for the privileges of sanctuary\* being taken away by the act of Ja. I. the abjuration, as at the common law, being founded thereon, was virtually abolished.

§ 3. At present, banishment is in England, as in Russia\*, more frequently inflicted as a mode of punishment, than permitted as an act of mercy. But in Russia it is made subservient to political utility; and those, who have by their misconduct lost all claim to the indulgence of their countrymen, are compelled to undergo a separation from all domestic connections, the rigours of a horrid climate, and the unhealthiness of mines, in

\* A very particular description of sanctuary and abjuration may be found in "Le Grand Coutumier," f. 13.

§ 3. See also the Mirror, c. 1. § 13.

\* L'exil en Sibirie porte avec soi une sorte de reprobation; il rend un homme si malheureux, que quoiqu'il vive au milieu de ses semblables, tout le monde de fait; personne n'ose avoir avec lui aucune espèce de liaisons; mais c'est moins à cause du crime qu'on lui suppose, que par la crainte qu'on a de le déshonorer.

Voyages en Sib. i. 1. p. 226.

the place of better citizens, who must otherwise be necessitated to accept so severe a lot.

On the contrary, every effect of banishment, as practised in England, is often beneficial to the criminal, and always injurious to the community. The kingdom is deprived of a subject, and renounces all the emoluments of his future existence. He is merely transferred to a new country; distant indeed, but as fertile, as happy, as civilized, and in general as healthy, as that which he hath offended.

It would not be incredible then, if this punishment should be asserted in some instances to have operated even as a temptation to the offence; in many instances hath its insufficiency been a fatal argument for the multiplication of capital penalties.

§ 4. It deserves serious and immediate consideration, how far, and by what means, this defect in our law may be redressed. It might perhaps be practicable to direct the strict employment of a limited number of convicted felons in each of the dock-yards, in the stannaries, saltworks, mines, and public

D

buildings



buildings of the kingdom. The more enormous offenders might be sent to Tunis, Algiers, and other Mahometan ports, for the redemption of Christian slaves: others might be compelled to dangerous expeditions; or be sent to establish new colonies, factories, and settlements on the coasts of Africa, and on small islands for the benefit of navigation. It must however be confessed, that it is not easy to determine upon theory the success of political innovations; it is indeed impossible for a speculative writer in his closet to collect the proper materials for this purpose. Practicable schemes on such subjects can only be obtained from merchants and others, who are qualified by experience to point them out, and have the inducement of interest to promote their success.

§ 5. I cannot dismiss this subject without expressing a doubt, relative to the propriety of punishing with death a return from transportation; especially where the original offence was not capital. It certainly is not justified by necessity: for it is easy, if requisite, to send the delinquent abroad again, without any considerable degree either of expence or trouble. Will it be said that he

deservedly suffers for the breach of a compact, which he is supposed to have made? In many instances the transportation is not in the nature of a conditional pardon, but directed by positive law; in no instance is

In support of this assertion I shall cite some authorities, previously observing, that, if exclusion from society is the proper punishment of those only, who are become objects of terror to their fellow-citizens in consequence of very heinous crimes, neither not equivalent to the *ultimū supplicium*, or of which they have been convicted by disputable and unsatisfactory evidence."

By 6 Geo. I. c. 23. and 4 Geo. I. c. 11. any persons convicted of treason, either grand or petty, and entitled to clergy, may in the discretion of the court be directed to be transported to America for seven years; and if they return within that time, it shall be felony without benefit of clergy.

By stat. 10 Geo. II. c. 32. the penalty of transportation for seven years is inflicted on the second offence of stealing deer in any uninclosed forest; and for the first offence upon such as come to hunt there, armed with offensive weapons.

By 26 Geo. II. c. 19. § 11. persons convicted of assaulting any magistrate or officer, &c. in the salvage of any vessel or goods, are to be transported for seven years.

Ibid. c. 33. § 8. persons convicted of solemnizing matrimony without banns or licence, &c. shall be transported for fourteen years.

Also, by 5 Geo. III. c. 14. persons, stealing or taking fish in any water within a park, paddock, orchard or yard, and the receivers, hidors, and abettors, shall be transported for seven years.

I have not selected these as the *most* exceptionable instances, there are many others, in which transportation is inflicted upon offenders by no means so heinous in their nature, as to require the extirpation of the criminal from the society of his fellow-citizens.

such a compact reconcilable to the law of nature.

On the whole, is not such severity inconsistent with that leading principle, which forbids penal laws to attack the natural sentiments of the heart? "*Duri est non desiderare patriam. Cari sunt parentes, cari liberi, propinqui, familiares; sed omnes omnium caritates patria una complexa est: pro qua quis bonus dubitet mortem appetere?*"

§ 6. By stat. 20 Geo. II. c. 46, it is made a felony, without benefit of clergy, for rebels under sentence of transportation to go into France or Spain; and the same severity is extended to all the friends of such persons, keeping or entertaining any correspondence with them by letters, messages, or otherwise.

In the wording of this clause, there is not any saving of even the most innocent interchanges of friendship. Shall then the lawgiver infringe all the ties and privileges of humanity? Shall he point the sword of justice against the bosom of fidelity? To such a lawgiver I would say, "Consult your own

heart,



"heart, and inflict not chastisement on ac-  
 "tions, which a good mind cannot disap-  
 "prove!"

CHAPTER V.

*Of Forfeiture and Corruption of  
 Blood.*

§ 1. *NEC vero me fugit, quam sit acerbum  
 parentum scelera filiorum poenis lui: sed  
 hoc prius legibus comparatum est, ut caritas  
 liberorum amissiones parentes reipublicæ red-*

On a superficial glance, it seems harsh in  
 a moral view, to extend the disgrace and in-  
 famy of the guilty ancestor to the innocent  
 descendant; and to involve a whole family  
 in the punishment of one criminal. In a po-  
 litical light, it seems contrary to the princi-  
 ples of freedom, to institute irregular fluctu-  
 ations of property, and to leave so baneful a  
 tool to the misapplication of possible ty-  
 ranny, or the rage of civil troubles. A  
 very ingenious answer hath been given to

Cic. ad Brutum, Ep. xii.

these objections by a late learned person, from whose excellent argument (without adopting all the conclusions for which he so ably contended) we must at least collect, that the law of forfeitures, when properly directed and restrained, is a salutary terror in defence of the state, neither cruel nor impolitic.

Was it ever alledged against the punishment of death, that its consequences cannot in any case be confined to the criminal; but must of necessity go beyond him, to some connected with him by "friendship, interest, or nature?"—Society is supported by this necessity, whilst individuals suffer by it. *Omne magnum exemplum habet aliquid ex iniquo, quod contra singulos utilitate publica rependitur.*

But it will be said, that the collateral consequences of forfeiture are not the creatures of necessity, but of positive institution. Be it so; it is neither unjust nor unwise to correct human partialities to the promotion of human happiness. Descend to the punishment of the criminal, as he never had any positive consequence, but the law of forfeiture, which could have no other consequence, but the promotion of the public utility.

Tacit. Annal. l. xiv.

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and the expectations of inheritance, are the gifts of society; conditional gifts, and therefore revocable, and may be modified by the public discretion for the public benefit.

§ 2. These arguments are offered in defence only of forfeitures immediately affecting the criminal; and it may seem a sufficient severity, that the children are thereby reduced to present poverty.—It is not so easy to reconcile either to reason or benevolence, that corruption of blood, a further consequence of English attainders, by which the inheritable quality is forever extinguished:

The grandfather possesses an estate in fee; his son commits treason, and is executed; this attainder is a never-ceasing bar to the claim of the grandchild, and his posterity. A father seised of an estate in fee dies, leaving two sons, the elder of whom is attainted; the younger cannot succeed, though the immediate descendant of innocent ancestors; nor can the children of the elder. Why, it will be said, should the impediment of blood stop the course of descent as to estates, over which, the criminal, as he never had any possession, could have no influence? It is an ob-



vious answer, that the law requires the claimant by descent to prove himself heir to the person last seised; and in these cases a link of the descending chain is irrecoverably lost.

We must not however argue from special cases against general systems. Perfection unexceptionable cannot be the result of human dispensations; and it would turn this beautiful fabric of our liberties to a fantastical, confused scene of preposterous distinctions, if it were allowable to set up personal compassion, and private hardships, in opposition to the consistency of legal principles.

§ 3. Yet there are cases, in which it is difficult for the artificial inferences of reason to give satisfaction to the natural dictates of sentiment—A criminal is attainted, in the year 1770, for an offence, then only discovered, but committed in the year 1760. Suppose him, in this interval, to have alienated one half of his estate to a fair purchaser, and to have contracted *bond fide* debts, equivalent to the other half. The *Attainder* must be dispossessed, and the honest creditors are left without remedy, for the forfeiture of lands says the law, has a relation to the time

## OF PENAL LAW. 41

of committing the offence, so as to avoid the intermediate charges and conveyances; and in these cases the descending chain is irreversibly lost.

Again, if the Husband and Wife be possessed jointly of a term of years in land, and the husband drown himself, the land shall be forfeited to the King; and the wife must lose the benefit of the survivorship. For, by the act of casting himself into the water, which is the cause of the felony committed, he forfeits the term; and this gives a title to the King, in preference to the wife's title by survivorship, which could not accrue till the instant of her husband's death.

Many of the inferior felonies subject the offender to the forfeiture of goods and chattels only; whence results a very unequal distribution of justice: A rich trader, and an affluent country gentleman, being involved precisely in the same species and degree of guilt, the children of the former are reduced to beggary, while the family of the latter retain all their opulence.

Blackst. Comment. iv. 190. Plowden 260. This was determined in the case of Lady Margaret Hales, wife of Sir James Hales (one of the Judges of the Common Pleas) who drowned himself in the third year of Q. Eliz.

The

The death of the ancestor, before conviction and judgment, discharges, as to the real estate, all proceedings and forfeitures. So that the law furnishes a temptation to the Criminal to rush uncalled for into the presence of the Almighty, with all his imperfections on his head, and the addition of Suicide to the catalogue of his offences.

Valerius Maximus gives us an example of the effect of a temptation of the same kind. He tells us, that Licinius Maccus, at the conclusion of his trial, perceiving Cicero ready to give judgement against him, stopped his breath with a handkerchief, and expired: and that the estate was thereby saved to his son Licinius Calvus, afterwards an Orator of great eminence. In the latter ages of the Roman law, a distinction was made, inflicting forfeiture on those who killed themselves under the accusation of a capital crime.

§ 4. Bills of attainder may with propriety be mentioned under the title of this chapter: they are exertions of those extraordinary legislative powers, which ought to be used



only on the pressures of real and urgent necessity; but never to be desecrated to the gratification of political resentments.

One of Henry the Eighth's parliaments attainted the Countess of Salisbury, the Marchioness of Exeter, and two Gentlemen, without any trial or even citation to appear, and without better proofs, than the unsupported suggestions of the wretched sycophant Cromwell. This instrument of regal tyranny fell a sacrifice to the same iniquitous measures himself. He was in the year following declared Vicar-general of the kingdom; and, a few weeks afterwards, under an attainder of the same parliament, without trial, examination of evidence, condemned to death, and executed.

It is impossible to apologize for the many bloody stains, which we find indelibly affixed upon English history, by this passionate and irregular mode of punishing. Even Strafford, whom, as an English statesman, we may as Englishmen, abhor, must in candour be confessed to have fallen a victim to the indiscreet rage of an English parliament.

<sup>a</sup> Burnet, vol. i. p. 278.

“lived, my lords (said he at the conclusion  
of his eloquent defence) happily to our-  
selves at home: we have lived gloriously  
abroad to the world: let us be content  
with what our fathers have left us: let  
“not our ambition carry us to be more  
“learned, than they were, in killing, and  
destructive arts: Were it not for the  
“interest of these pledges, which a Saint  
“in heaven left me, I should be loth”—  
(here he pointed to his children, his voice  
faltered, and his weeping stopped him)  
what I forfeit for myself, it is nothing:  
“but, I confess, that my indiscretion should  
“forfeit for them, it wounds me very deeply.  
“You will pardon my infirmity: something  
“more I should have said; but I see I shall  
“not be able, and therefore I shall leave  
“it.”

Such (says the philosophical Historian)  
were the capacity, genius, and presence of  
mind, displayed by this magnanimous states-  
man, that, whilst argument, and reason, and  
law had any place, he obtained an undisputed  
victory: and he perished at last overwhelmed,  
and still unshaken, by the undignified vio-  
lence

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of his fierce and unrelenting animosity. *Weak is the effect of eloquence on the pre-determinations of party!* The parliament proceeded in the attainder; but in a few weeks remitted to the children the more severe consequences of the sentence.

The following note, which was copied from the Lord Primate Usher's Almanack, furnishes matter for much reflection.

— "My Lord, I have just met the King, who wishes me to deliver unto my Lord Strafforde to-morrow,

(1) That, if the King's own life were only hazarded thereby, he would never have given passage unto his death.

2. That the Execution without extream danger cannot be deferred.

3. That he was moved by the Lords for his wife and children, and intended to dispose his entire estate upon them.

4. That, if his son be capable, he will take special notice of him for his employment and preferment, (which I must tell none but him.)

5. That for Lord Chancellor, Lowther and Derry, he does not proceed until they give good reason for their authority.

6. L. Dillon's ability above all the natives.

7. That Sir Orlando shall be Knight of the Garter in his place.

8. Carpenter to be at liberty to look to his estate, or any one whom he shall appoint to have care of his children.

May 12. The Lord Strafforde beheaded at Tower-hill. See the Strafforde Letters, vol. ii. p. 418.

That,



That, *“whoever deserves to die, and dies by*  
*an Act of the whole Legislature, dies justly.”* is  
 a position, which in the construction of un-  
 prejudiced reason is certainly true; but it  
 should be remembered, that many requisites  
 must concur to shew, that the party pro-  
 secuted *deserves to die*; requisites, which, in  
 most cases of attainders, have been too pre-  
 cipitately assumed. But I return to my sub-  
 ject.

§ 5. Upon the whole, though it be not  
 unequivocal, *“that those contingent advan-  
 tages, which the civil qualifications of the  
 blood have brought into view by the desert  
 of one Ancestor, should be intercepted by the  
 crimes of another.”* yet it is with pleasure,  
 I see the approach of that day, when the  
 posthumous rigours of forfeitures will cease,  
 and the impediments of descent no longer  
 affect a blameless posterity.

The Stat. 7 Ann. c. 21, provides, that,  
 after the death of the then Pretender, no  
 attainder for treason shall extend to the dis-  
 inheritings of any, heir, nor to the prejudice  
 of the right, or title of any person, on per-  
 the Scots (who had no intention to make  
 \* Considerations on the Law of Forfeiture.

sons, other than the right or title of the offender, or offenders, during his, her, or their natural lives only; giving also a power of entry after their deaths, as if such attainder had never happened.

It was thought expedient, in the year 1744, to suspend the operation and effect of this statute, till after the decease of the present Pretender and his brother.

This suspending clause was debated with great warmth, and profusion of learning, between Sir Dudley Ryder, and Mr. Fazakerly; by the latter of whom it was contended, to be virtually subversive of the conditions of the Union, inconsistent with the spirit of our constitution, with the dictates of humanity, and the principles of policy. It was first moved in the upper house by Lord Bathurst, seconded by Lord Hardwicke, and was there also the subject of much eloquence.

In 1746, when the act of Union passed in the fifth year of the Queen, this point had been left undetermined; but, upon a grant undertaking, well understood on the part of the Scots, (who had no intention to make them-

themselves liable to English attainders) that it should be afterwards adjusted. The subsequent Act was accordingly framed "for improving the union of the two kingdoms." But, as a total immunity from the forfeiture of real estates was not founded on any requisition of Scotland, either expressed or implied, it is difficult to conceive the reason which induced the parliament to carry the remedy so far beyond the grievance then in contemplation.

The mere execution of the criminal is a fleeting example; but the forfeiture of lands leaves a permanent impression: It is indeed one of our best constitutional safe-guards, when applied with discretion to the preservation of moral conduct, and used without violence to the correction of guilt. *This branch of the penal system will not therefore be suffered to fall from the body of our law without*

\* Stat. 7. Anne, c. 21. the preamble is in the following words. "Whereas nothing can more conduce to the improving the union of the two kingdoms, than that the laws of both parts of Great Britain, should agree as near as may be, especially those Laws which relate to High Treason and the proceedings thereon, as to the nature of the crime, the method of prosecution and trial, and also the forfeitures and punishment of that offence; which are of the greatest concern both to the King and the Subject."

*serious*



*serious consideration*: but we may safely conclude, that the corruption of blood, with all its endless consequences, will have a speedy and total abolition; as any further intervention of Parliament therein would be contrary to that sacred regard, which is due to national compacts.

§ 6. But it should be observed, that this Provision extends to Attainders, only in cases of high Treason: they will still operate in full force upon the crimes of petty treason, and on many of, if not all, the higher felonies.

If such an inconsistency be suffered, it will make the English law the very reverse of the system of Arcadius; who, leaving treasons liable to the utmost severities, speaks of other offences in the following words: "*Sancimus*  
 "*ibi esse pœnam, ubi & noxia est: propinquos,*  
 "*notos, familiares, procul a calumniâ submo-*  
 "*vemus, quos reos sceleris societas non facit.*  
 "*Nec enim affinitas, vel amicitia, nefarium*  
 "*crimen admittunt: peccata igitur suos teneant*  
 "*auctores, nec ulterius progrediatur metus,*  
 "*quam reperiatur delictum.*"

## C H A P. VI.

*Of Imprisonment.*

§ 1. **I**mprisonment, inflicted by law as a punishment, is not according to the principles of wise legislation. It sinks useful subjects into burthens on the community, and has always a bad effect on their morals: nor can it communicate the benefit of example, being in its nature secluded from the eye of the people.

These objections are obviously true; but their influence on the Laws of England hath not been uniform. It is not unusual, by the positive institutions of this land of liberty, to punish offenders by confinement: in many cases, temporary; in others, as in the instance of striking at any person in the King's courts of justice, of rescuing a prisoner, and in every case of Praemunire, perpetual. And in this light, as a mode of punishment, it was considered in the earlier ages of our Law; of which I find the following instance in the statute

statute of Westm. the 2d, A. D. 1285 m.

"*Qui monialem a domo suâ abducatur, licet monialis consentiat, puniatur per prisonam trium annorum, et satisfaciatur domui, a quâ abducta fuerit, competenter.*"

§ 2. It is the proper end of custody, to keep those, who are accused of injuries to society, amenable to the decisions of justice. But, as accusations are not proofs, and as innocence is to be presumed in every stage of the charge, previous to the conviction of guilt; the utmost tenderness and lenity are due to the person of the prisoner. And here it should also be observed, that it is contrary both to public justice and public utility, to throw the accused and convicted, the inno-

[<sup>m</sup> 13 Ed. I. c. 34.

The power of taking bail, which in effect is only a milder species of custody, is a consequence of this presumption; and appears to have existed in every polished system of laws, with regard to all offences except those of the highest enormity, in which nothing less than the person of the accused is thought to be a sufficient pledge for his future appearance. Such particularly is the idea of our law, and such was the language of the Roman Digest: "*In vincula non conjiciendus est reus, qui fidejussores dare poterit, nisi tam grave scelus eum admisisse constet, ut neque fidejussoribus, neque militibus committi debeat.*"

Dig. l. xlviii. t. 3. 3.



cent and the guilty, indiscriminately, into the same Dungeon.

From a numberless variety of accidental circumstances, which happen in the course of human transactions, it must fall to the lot of many, to become Insolvent. Debtors therefore, though certainly a species of Criminals, should in general be considered rather as unfortunate, than culpable. Humane treatment they have a claim to; nor can we consistently with any good principle, either of morals or government, refuse the same to persons, accused, or even to the most atrocious convicts. It will follow, that a special care should be taken, that the necessary miseries of a jail may not be aggravated by the unrestrained cruelty of the jailer.

§ 2. I might refer to the very excellent provision of the civil law on this subject:

• It seems to be a defect in our government, but incapable perhaps of any practicable remedy, that the conduct of insolvent persons, prior to their insolvency, is not, except in the instance of Bankrupts, subjected to some legal mode of inquiry. The case of a confined debtor, whose confinement is the mere consequence of inevitable misfortunes, without any mixture either of criminality or neglect on his own part, is extremely pitiable, and contradictory to every just principle of legislation.

Domar's Civil law, v. ii. p. 287.

but such peculiar attention hath been shewn to it both by the common, and statute law of England, that nothing more can be desired; except that improvement in the airiness and extent of the buildings, which the industrious refinement of a sensible age is soon likely to produce.

The appointment of jailers rests with the sheriff, who is in some degree responsible for their good behaviour, and interested therefore in the choice of proper persons; from whom he is also required to exact very ample security. The body of a man dying in prison is not to be interred, until the Coroner's inquest hath examined it: and, in point of law, if a prisoner dies in duress of the jailer by hard confinement, and severities unnecessary to the safe custody, it is murder. These preventives of secret tyranny

*Dart. c. 118, 4 Rep. 34, 3 Inst. 52, 91. Strange, 858, and 884. The cases of Carter v. Bambridge and Corbet; and of the King v. Huggins. Mr. Justice Foster, p. 322, hath inadvertently stated the opinion collaterally given by the court in these cases, as the positive decisions of the court against the defendants; whereas, in the first case, there being no pretence to charge either of the appellates, the jury brought them in "Not guilty;" and in the other case, "it is the judgment of the court on the special verdict, that the prisoner Huggins is Not guilty, and therefore he must be discharged."*

have been well preserved to the subject by frequent prosecutions, the effects of useful and compassionate enquiries, occasionally instituted by the two houses of Parliament. And lastly, the abuses, extortions, and insults of jailers towards the unfortunate persons in their custody, are more particularly guarded against by a late very comprehensive statute; the provisions of which are very beneficial both to debtors and criminals, though more especially intended for the former.

§ 3. This extraordinary anxiety of our law in favour of prisoners is by no means superfluous; for it must be confessed that jailers are in general a merciless race of men.

The Count de Lauzun passed the long interval from the year 1672 to 1681 in the prison of Pignerol. It has been well observed, "that, with pen, and ink, and paper, albeits a man cannot get out of prison, he may do very well within, and at last come out a wiser man than he entered;" but these consolations did not fall to the lot of the Count



de Lauzun.—At a distance from the voice of friend or relation ; without any sounds except his own sighs ; without any light except the glimmering through the ruins of the roof ; without books, means of occupation, or possibility of exercise ; a prey to hope deferred, corroding languor, and uninterrupted horror ; he at last, as the only means of avoiding insanity, had recourse to the expedient of taming a spider.—“ Misery, says Trinculo, makes a man acquainted with strange companions.” The spider received his flies every morning with gratitude, carried on his webs through the day with alacrity, and engaged the whole attention of his benefactor ; until the jailer, conversant in scenes of wretchedness, and consequently steeled against every tender sensation, accidentally discovered this amusement of his prisoner, and in the wantonness of tyranny officiously destroyed the subject of it. M. de Lauzun afterwards declared, that he conceived his agony on this occasion to have been more painful than that of a fond mother on the loss of a darling child.

thought a more respectable death to be be-  
headed.

C H A P. VII.

§ 1. Let legislators then remember, that  
the state of economy is intrusted to their  
disposal, and that their duty is with economy,  
and discretion, to provide an instrument for the  
promotion of morality, and the extirpation  
of vice.

§ 1. **W**E are told, that in Sparta it was  
thought a very disgraceful sen-  
tence for the criminal, to lose the privilege of  
lending his wife to another man, or to be  
confined to the society of virgins.

The authenticity of the fact is immaterial,  
if the inference be admitted; which is, that  
in a moderate and virtuous government, the idea  
of shame will follow the finger of the law; and  
that, whatever species of punishment is point-  
ed out as infamous, will have the effect of in-  
famy. *Existimatio est dignitatis illæse status,  
legibus ac moribus comprobatus, qui ex delicto  
nostro, auctoritate legum aut minuitur, aut con-  
sumitur.* The punishment of strangling is  
deemed honourable by the Ottoman family,  
who think it infamous, that their blood should  
be spilt upon the ground; in England, it is

in proportion to the exorbitance of his de-  
lict; Dig. l. i. t. 13. § 1.

thought

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thought a more respectable death to be beheaded.

§ 2. Let legislators then remember, that the stamp of ignominy is intrusted to their disposal; and let them use with economy, and discretion, this best instrument for the promotion of morality, and the extirpation of vice.

Shame loses its effect, when it is inflicted without just and cautious distinctions; or when, by the wantonness of oppression, it is made familiar to the eye. The sensibility of the people, under so extravagant an exertion of power, degenerates into derpondency, baseness, and stupidity: their virtue is of forced extraction, the child of fear, with all the meanness of the parent entailed upon it. The tranquillity of such a state, says Montesquieu, is the mournful silence of a city, which the enemy is about to storm.

The present Empress of Russia is aware, that immoderate efforts are the symptoms of insufficiency, and have always more fury than force; that the security of the prince decreases in proportion to the exorbitance of his despotism;



tion; and that the national sensibility is the best spring of national power. But a few years ago, prior to the reign of the late Empress Elizabeth, it was no more disgrace to a Russian nobleman to receive a public flogging from the arm of the hangman, than it is at this moment to a miserable Japanese to pay with his skin the costs of a civil action, thought nugatory by the judge. The Muscovites no longer wed their wives with a whip instead of a wedding ring; and Russia rises into the respect of Europe. The Japanese still submit to the daily discipline of the lash; and Japan continues the contempt of the world. The cudgel (says du Halde) is the governor of China; the Chinese (says the writer of Lord Anson's voyage) are eminent for timidity, hypocrisy, and dishonesty.

§ 3. Corporal punishments immediately affecting the body, and publicly inflicted, ought to be infamous in the estimation of the people; so should degradations from titles of honour, civil incapacities, brandings, and public exhibitions of the offender: all which penalties should be applied with

with great caution, and only to offences, in-  
famous in their nature.

§ 4. In any case, to fix a lasting visible  
stigma upon the offender, is contrary both  
to humanity and sound policy. The wretch,  
finding himself subjected to continual insult,  
becomes habituated to his disgrace, and loses  
all sense of shame. It is impossible for him  
to form any irreproachable connection; for  
virtue, though of a social nature, will not  
associate with infamy. Yet this practice  
of branding hath prevailed in every known  
system of laws; as with us at present, in  
the punishment of many offences; and in

The Preamble of stat. 5 Ann. c. 6. is a strong in-  
stance in support of this position.—"Whereas by stat. 12  
" & 12 W. III. § 6. it is enacted that all and every person  
" and persons, who should be convicted of any Theft,  
" and should have the Benefit of Clergy allowed there-  
" upon, or ought to be burnt in the hand for such of-  
" fence, instead of being burnt in the hand, should be  
" burnt in the most visible part of the left cheek nearest  
" the nose: and whereas it hath been found by experience,  
" that the said punishment hath not had the desired effect, by  
" deterring such offenders from the further committing such  
" crimes and offences: but on the contrary, such offenders, be-  
" ing rendered thereby unfit to be entrusted in any honest and  
" lawful way, become the more desperate: Be it there-  
" fore enacted, that the aforesaid clause shall be and is  
" hereby repealed."

all

all cases, when the offender, not being a clergyman, is admitted to the benefit of clergy. In like manner by the laws of France, "*Ceux & celles, qui après avoir été condamnés pour vol, ou flétris de quelque autre crime que ce soit, seront convaincus de récidive en crime de vol, ne pourront être condamnés à moindre peine que, savoir les hommes aux galères à tems, ou à perpétuité, et les femmes à être de nouveau flétries d'un*" W. "*si c'est pour récidive de vol, ou d'un simple*" V. "*si la première flétrissure a été encourue pour*" "*autre crime.*" Et ceux qui seront condamnés "*aux galères à tems ou à perpétuité pour*" "*quelque crime que ce puisse être, seront*" "*flétris, avant d'y être conduits, des trois let-*" "*tres G. A. E. pour, en cas de récidive en*" "*crime qui mérite peine afflictive, être punis de*" "*mort.*" So also among the Romans, it was usual, but only when the crime was infamous in its nature, to affix some branding or ignominious letter, on the forehead of the criminals; and persons so branded were afterwards called, *inscripti* or *stigmati*, or, by a

Code penal. 8vo. A. D. 1755, p. 105. Declaration du Louis XV.

\* Ibid. p. 138.

more



more equivocal term, *literati*. One might almost say that those literary acquisitions were in some instances voluminous: for Zonaras relates that Theophilus the Emperor caused twelve verses to be inscribed on the foreheads of two monks; and we find in Petronius, *quod implevit Eumolpus frontem Encolpi & Cyonis ingentibus literis, & notam fugitivorum epigramma per totam faciem librari manu duxit.*

There are two kinds of infamy, the one founded in the opinions of the people respecting the mode of punishment, the other in the construction of law respecting the future credibility of the delinquent: the law of England was erroneous, when it declared the latter a consequence of the punishment, not of the crime. — There still exist some unrepealed statutes, which inflict perpetual infamy on offences of civil institution. But in general the rigour of this doctrine is now

abolished. See Stat. 1. R. 2. c. 13. *Nulli damnis literariorum.* Stat. 1. R. 2. c. 13. *Nulli damnis literariorum.*

I was mistaken in supposing that this expression had been adopted by stat. 4 H. VII. c. 13. which recites that divers persons lettered had been more bold to commit mischievous deeds, &c. That word clearly relates only to scholars and the clergy.

Coke, Litt. 6. b.

2 & 3 Edw. VI. q. bidl.

reduced

reduced to reason; and it is holden that, unless a man be put in the pillory, or stigmatised, for *crimen falsi*, as for perjury, forgery, or the like, it infers no blemish on his attestation. It may be highly penal to engross corn, or to publish a pamphlet offensive to government; but mercantile avarice, and political sedition, have no connection with the competence of testimony; the credit of an oath can only be overbalanced by the nature and weight of the precedent iniquity. Such was the reasoning of the Roman law. *Istius fastidium infamiam non importat, sed causa, propter quam id patitur deest; si ea fuit, quae infamiam damnato irrogat.*

§ 6. I say nothing of bastinadoes, mutilations, and a variety of other modes of corporal punishment, equally inconsistent with decency and humanity: such refinements of cruelty put the whole species, rather than the criminal, to disgrace.

Artaxerxes moderated the severity of the laws of Persia, by enacting, that the nobility

1. Gibber's Law of Evidence, p. 143. 2. Plutarch, who

who debased themselves, instead of being lashed, which had been the practice, should be stripped, and the whipping be given to their vestments; and that, instead of having the hair plucked off, they should only be deprived of their high-crowned Tiara.

The English constitution, ever anxious to preserve the virtuous pride of the people, hath used this branch of the penal code with a reserve so scrupulous, that it may almost be doubted, whether more attention hath not been shown to the protection of this principle, than to the preservation of life: for corporal pains might certainly with good effect be substituted, in some cases, in the room of capital judgments.

Yet, without any very strict scrutiny into our statute books, one may point out many provisions still existing, which are disgusting to humanity, and offensive to common sense.

It is easy to conceive, why the hand which gives a blow in a court of justice should be cut off by edict of law; the analogy between the offence and the penalty is evident: though it was at least a condescension to



minutenesses in that parliament, which, "to give more solemnity to the operation," ordered the master-cook, and serjeant of the larder to attend with dressing knives; the serjeant of the wood-yard to furnish a chopping-block, the yeoman of the scullery to attend with a pan of coals, and the serjeant-farrier to bring hot irons to sear the stump. But it is not so easy to acquiesce in the propriety of punishing a blow given in a church-yard, with the loss of an ear<sup>h</sup>; though we are told, that it was intended to obviate the quarrels of Protestants, and Papists, at the first establishment of the Reformation. Under a similar disregard to relative propriety, Henry the First seems to have enacted "*quod falsarii monetæ oculos et genitalia amitterent, absque aliquâ redemptione*." Less absurd was the conduct of Severus, who punished a notary for the exhibition of a forged plead-

<sup>a</sup> Stat. 33 Hen. VIII. c. 12.

<sup>b</sup> 5 and 6 Edw. VI. c. 4. or, "having no Ears, the offender shall be branded with the letter F in his cheek."

<sup>c</sup> Wilkins, Leg. Anglo-sax. p. 304. Knyghton, p. 2377. and in the Annales de Margan, sub anno 1124. "Monearii autem numero xciij jussu Regis in Normannia consistentis die Epiphaniæ Genitalibus privati sunt." And in the Records about the time of the Conquest, it is very frequently said, in regard to other offences, that the convict "*pro feloniam suam fuit occæcatus, et ementulatus, et bona sua eschaet. Regi.*"

ing,

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ing, by ordering the nerves of his fingers to be cut, that he might never be able to write again; as was also a Law of Edward the First, how unjustifiable soever on account of its cruelty, against the third offence of theft from the lead mines in Derbyshire; "that a knife should be struck through the hand of the criminal fixed on the table; and that in this agony and attitude he should continue, till he had freed himself by cutting off his hand."

The eighth of Eliz. c. 3. punishes with imprisonment, and the loss of the left hand, the sending of live sheep out of the kingdom, or the embarkation of them on board of any ship; and this too, without any exceptions of the necessary provisions for the ship's crew: the second offence is made only a clergable felony.—Sir Edward Coke thinks<sup>1</sup>, that the benefit of clergy might be pleaded, as well in case of cutting off the hand, as in case of felony; if so, and if the offender were fortunate enough to have learnt to read, he could never have suffered under this act.

<sup>1</sup> Fuller—and Observ. on the ancient Statutes, p. 280.  
<sup>2</sup> 3 Inst. 104.—Staunford 37. b. is referred to by Sir Ed. Coke; but I have not been able to find any such opinion.

The 14th of Eliz. c. 5. directed vagabonds to be severely whipped, and burned through the ear with a hot iron, the compass of an inch; and for the second offence to suffer death. This was a temporary act, and not continued in force.

It will not easily be credited by those, who do not possess the Statute which I am about to mention, yet it is certainly true, that by *Stat. 10 Geo. III. m. c. 19. A. D. 1770*, "every person whatsoever, taking, killing, or de-

<sup>m</sup>It is remarkable, that this Statute was made at a time, when "the Commentaries on the Laws of England" must be supposed to have been very recently perused by every Member of the Legislature. The writer of that admirable work hath, with peculiar anxiety, shewn "the necessity of not deviating any further from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions."

And surely, the corporal punishment of an Englishman, by the suffrage of one person only, is inconsistent with every idea of English Liberty. Yet this unsatisfactory mode of trial was instituted for the promotion of speedy justice; and as a species of mercy to Delinquents, who, in trivial misdemeanors, might otherwise be ruined by the expence and delay of frequent prosecutions by indictment: but it hath been extended in a degree truly formidable. The Courts Leet and Sheriff's Tourns are fallen into disuse, and the jurisdiction of individuals is aggrandized beyond measure: a jurisdiction, which, by its burthensome consequences becoming disgusting to men of fortune and education, too often falls into the hands of the mercenary and the ignorant.

"stroying



83

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"stroying any hare, pheasant, partridge,  
 "moor-game, &c. or using any dog, gun,  
 "&c. for that purpose, between an hour after  
 "sun-setting, and one hour before sun-rising,  
 "and convicted thereof *before one* or more  
 "justice or justices, *upon the oath of one* or  
 "more witness or witnesses; shall for the  
 "first offence be imprisoned, not less than  
 "three months; for other offences not less  
 "than six months; and either for the first,  
 "or any other offence, *be once publicly whip-*  
 "*ped* in the town, where the jail or house  
 "of correction shall be, within three days.  
 "from the time of his commitment, between  
 "the hours of twelve and one o'clock in the  
 "day." And this is enacted *even without any*  
*reservations, or distinctions, as to the rank, qua-*  
*lity or fortune of the offender.*

The tacit disapprobation of mankind con-  
 signs such laws to disregard and oblivion:  
 but they should be repealed, to prevent every  
 possibility of oppression on the one hand, and  
 to stifle all hopes of impunity on the other.

## C H A P. VIII.

*Of Fines.*

§ 1. **P**ecuniary penalties form the last and best class of those salutary restraints of law, which alone render national liberty either valuable or permanent. It is a wise and merciful institution, which converts the little attachments of selfishness, into the strong holds of society. Let the inordinate sallies of profligacy be controuled in their first efforts; and the frequency of capital, and corporal punishments will soon become unnecessary: that frequency, so fatal to the present, and future happiness of the sufferers, so subversive of every sentiment of national benevolence!

§ 2. There exists however to this mildest mode of punishment a plausible objection, which makes it seemingly repugnant to the genius of a government, formed and supported on maxims of freedom: *the quantum of the fine must in most cases be left to the discretion of the Judges.*

The

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The value of money and property is subjected to daily and unforeseen fluctuations: the circumstances of the offenders, like the circumstances of their offences, are infinitely various. It is impossible therefore, in this age of refinement, to imitate the simplicity of the Ancient Britons, to annex specific penalties to specific classes of crimes, and to establish a wholesale traffic between criminals and courts of justice.

Howel Dda found no difficulty in saying<sup>a</sup>, that the fine for murdering a Chancellor should be 189 cows; for killing the Queen's cat, as much wheat as would cover her, when suspended by the tail; for a perjury, three cows; for the rape of a maid, twelve cows; of a matron, eighteen; and in cases of seduction, "*Vir, si factum denegaverit, jurabit super campanam eccl. sue malleo destitutam; quod si falsus fuerit, compensabit denariis totidem, quot nates feminae operiantur.*"

I see no reason, except what arises from their internal absurdity, to doubt the authen-

<sup>a</sup> Leges Wallicæ, p. 116. 202, &c.



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ticity of these laws; or to suppose, that they were not the most serious efforts of Welsh Jurisprudence. For on this point, the same want of common delicacy, and common sense, is very conspicuous in the Institutes of our good King Alfred; and in the ancient Codes of the Burgundians, and of Sweden, and indeed of all the German nations. They had no settled rule of distinction between accidental damages, and intentional injury; between voluntary, and involuntary acts. "It was (says a learned Writer) the first indication of the approach of these nations towards politeness, that their compositions for injuries, done to women were generally doubled."

In short, in the ages of imperfect civilization, "Justice seems to have been administered, merely to give a protection to the criminal against the party injured; and this protection was given to the former, in con-

They were made, A. D. 914. *Addibitis populi frequentibus comitis in Casa Candida super fluvium Tasi.*

Spelm. Gloss. p. 362.  
Leg. Anglo-sax. p. 37. — Civil. Reg. Sueciae, l. xi.

c. 12. See Dr. Robertson's Hist. of the Emperor Charlemagne, p. 32, &c.

L'Esprit des loix, l. xx. c. 20.

consideration

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consideration of the fine, which the latter was obliged to receive. This was called a composition, and the resentment of the offended family was cancelled. Such is the character given by Tacitus of the Germans: "*Suave pere inimicitias seu patris, sue propinqui necesse est: nec implacabiles durant: luitur enim etiam homicidium certo armentorum ac pecorum numero, recipitque satisfactionem tota domus.*"

We find also in Homer frequent mention of the price of blood as paid to the representatives of the deceased; and the ninth book of the Iliad is founded entirely on the efficacy of presents in the expiation of an injury.

By such means individuals were first taught to acquiesce in the general dispensations of law, and by degrees to consider injuries to themselves as injuries to society. But, prior to the establishment of these compositions, Every offended Baron buckled on his armour, and fought redress at the head of his vassals. His adversary met him in like hostile array. Neither of them would submit points in which their passions were warmly interested, to the slow determination of a judicial enquiry. Both trusted to their swords for the decision of the contest; the kindred and dependants of the aggressor, as well as of the defender, were involved in the quarrel.

See Dr. Robertson's Hist. of the Emperor Charles the Fifth, v. i. p. 44.

§ 3. In the course of society, riches must branch into very unequal proportions; and stated fines to specified crimes must become subjects of mockery and indifference to some offenders, of ruin and desolation to others and their families.

A modern Lawgiver shrinks therefore at the recital of the ancient amercements: he feels, that the Law on this point cannot, consistently with reason, be fixed, and determinate. The enormity and tendency of the crime, the malice and wilfulness of the intention, the inconsiderateness and suddenness of the act, the age, faculties, and fortune of the offender, form a chain of complex questions; which can be resolved only by the evidence of each separate charge, and for which no human foresight can provide.

Here then arises a necessary appeal to the breast of the judge; an appeal, which, under the families of Tudor and Stuart, became occasionally the instrument of extortion and tyranny: but which was, even in those reigns, (for the Bill of Rights was only declaratory of the old constitutional privileges) subjected by the law of England to such wise regulations,



and barriers, as ought to have secured to the subject every benefit of certainty.

It is the usage of the courts, superinduced on the clause of Magna Charta relative to civil amercements<sup>1</sup>; never to extend the fine of any criminal so far, as to take from him the implements, and means of his profession, and livelihood; or to deprive his family of their necessary support. If the produce of his property, under those humane restrictions, be thought inadequate to the degree of the offence, some corporal punishment is inflicted, or stated imprisonment: the impropriety of the latter, as a penal judgement, I have already observed. As a further safeguard against possible oppression, all grants and promises of

<sup>1</sup> C. 20. Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti, et pro magno delicto amercietur secundum magnitudinem delicti, *salvo contemento suo*, et mercator eodem modo *salva mercandisa sua*, et villanus eodem modo amercietur *salvo wainnagio suo*, si inciderit in misericordiam nostram; et nulla predictarum misericordiarum ponatur nisi per sacramentum proborum hominum de visneto; comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti.

The idea of leaving to the defendant the tools in trade and husbandry, and the beasts of the plough, appears to have been taken from the Roman law.

See Gilbert's Forum Romanum, p. 25. and Wood's Civil Law, p. 334.

fines, and forfeitures, of particular persons, before conviction, are illegal and void.

§ 4. The wisdom of our Law, having thus amply secured the property, and personal freedom of the subject, hath rarely thought it advisable to affix certain sums to specified crimes: I shall however mention one instance to the contrary; which, on account of its singularity, deserves attention.

The 37th H. VIII. c. 6. intituled, "the bill for burning of frames," and still in existence; for the better prevention also of "the cutting out of beasts tongues, and the damms of stew-ponds; the cutting off the ears of his Majesty's subjects, and the heads of conduit pipes; the barking of apple-trees, and divers other like kinds of miserable offences, to the great displeasure of Almighty God, and of the King's Majesty;" gives treble damages, recoverable by action of Law, to

the Bill of Rights, stat. 1 W. and M. stat. ii. c. 2. But it was long before holden by Sir Edward Coke to be an illegal practice. "For when a subject obtaineth a promise of the forfeiture, many times undue means, and more violent prosecution is used for private lustre, tending to destruction, than the quiet and just proceeding of law would permit, and the party ought to live of his own, until attainder." 2 Inst. 48.

the

## OF PENAL LAW. 75

the party injured, and a fine of  $\times 1$ . sterling to the King's Majesty.

This statute wants no observation upon it; except, that I have not stated it on account of the equivocal idea of treble damages for an ear: treble damages have in all cases the sound of absurdity, though not uncommonly prescribed in statutes, which give penal Actions.

§ 5. *The excellence of the Penal system consists in the reasonable selection of the objects of its coercion, in the moderate and judicious application of its penalties, in the perspicuity of its expression, in the notoriety of its mandates, and in the certainty of its execution.* But it may be rendered still more perfect by the addition of certain salutary precautions, which favour in some degree of punishment, though intended in their general purport merely for the prevention of crimes.

And here it is with pleasure, that I take the opportunity of mentioning an institution full of wisdom and Humanity, of ancient use in England, and very imperfectly known to any other country. That wise institution

of



of our Ancestors I mean, which, dividing the people in to certain classes, compelled the several neighbourhoods or divisions of men to become mutual pledges for the good behaviour of the individuals, who composed them; and consequently, when any offence was committed within their district, either to produce the offender, or become liable to such penalty as might be thought proportionable to the injury offered to the peace of Society. *Securitas fiebat scilicet, quod de omnibus villis totius regni sub decennali fide-jussione debebant esse universi; ita quod si unus ex decem foris-fecerit, novem ad rectum eum haberent: \* summa et maxima securitas, per quam omnes statu firmissimo sustinebantur!*

The additional facility of mutual intercourse between the different provinces of the kingdom, the improving uniformity of language which arose from that intercourse, the increasing numbers of the people, and their unsettled inhabitancy occasioned by the pursuit of commerce, severally contributed to throw this plan of police into gradual disuse. In its original extent it is become perhaps

\* Wilkins, Leges Edwardi, c. 20.

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impracticable; but some of its best vestiges are still visible in our Laws.

In general, every person, as even a wife against her husband or a husband against his wife, who hath cause to apprehend that another will do any corporal hurt to him, hath a right to compel such person to give security to a magistrate, that he will not do any act, that shall amount to a disturbance of the peace; and this is called a *recognizance of the peace* \*. It is in the nature of a conditional debt, payable only to the King, but in which both the King and the subject are supposed to have an interest †.

The complainant must verify upon oath, that his application to the Magistrate is not made from motives of malice, or to give vexation; and, if the person complained of shall refuse, or be unable to find sufficient surety, he shall be committed to prison.

\* 1 Hawk. P. C. 126, Commentaries, b. iv. c. 18.

† For which reason it seems an absurd position in our law, that a recognizance may be discharged by the demise of the King; or that it may be released by the party at whose complaint it was taken.

It is also usual, upon the conviction of certain Misdemeanours, to make *sureties for the future good behaviour* of the offender, a part of the punishment. And it is holden under the Stat. 34 Edw. III. c. 1. that the Magistrate hath a discretionary power to take such surety from all persons of evil fame, or, in other words, whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous; as from those, that sleep in the day, and go abroad in the night; and such as keep suspicious company. All such persons are presumed to have been in some degree criminal in their conduct; and consequently to be the proper objects of that preventive justice, which is calculated for the amendment of offenders, the example of others, and the security of the state.



CHAP. IX.

*Of the Disposal of the dead Body of the Criminal.*

§ 1. **T**HE Roman Law permitted the murderer to remain on the gibbet, after execution, as a comfortable sight to the friends and relations of the deceased.

*Nec furtum feci, nec fugi, si mihi dicat  
Servus: Habes pretium; loris non ureris; aio.  
Non hominem occidi; Non pasces in cruce corvos.*

The Mosaical Law directed the body of the criminal to be buried on the day of his death, "that the land might not be de-  
"filed."

<sup>2</sup> *Ut et conspectu deterreantur alii, et Solatio sit cognatis interemptorum.* ff. 48. 19. 28. § 15.—A. D. 1741, when the English Regency made an order to hang the murderer of Mr. Penny in chains, they inserted therein: "that it was on the petition of the relations of the deceased," St. Tr. vol. x. 39.

<sup>3</sup> Horat. Epist. l. i. ep. xvi. 46.

<sup>4</sup> Deuteronom. xxi. 23.

It cannot with any propriety be said, that there is inhumanity, but it may be doubted, whether there be wisdom, in the adoption, which the Laws of England have made on this point, of the rescripts of the Emperors, in preference to the command of Moses.

We leave each other to rot, like scare-crows in the hedges; and our gibbets are crowded with human carcases. May it not be doubted, whether a forced familiarity with such objects can have any other effect, than to blunt the sentiments, and destroy the benevolent prejudices, of the people?

§ 2. The ignominious burial of persons guilty of suicide might perhaps, if strictly executed, form some check on the sin of self-murder; but, in this case, Juries are more generally guided by the momentary impulse of compassion, than by a proper attention to the general benefit.

§ 3. To the dissection of criminals it is impossible to offer any solid objection. Modern ages will confine it to the dead, and turn a deaf ear to the anatomist, who laments the *Æra* of his own existence, "*Ubi, præ iniquitate*"

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*iniquitate temporum, vivos homines diffecare non licet<sup>c</sup>."*

§ 4. There is a seeming liberality of sentiment in the proposal, to subject certain classes of criminals to medical experiments for the benefit of mankind. England was by these means enabled to extend inoculation through Europe, and consequently to save the lives of millions.

I am apprehensive, that I dissent from a very learned writer<sup>d</sup>, when I assert, that such a plan can never with any propriety receive the legislative sanction.

If the experiments be without hazard, they are unnecessary; because equally practicable on the innocent and on the guilty: if of a nature to maim and disable, they are cruel and impolitic: if dangerous to the life, the uncertainty of the event destroys all the solemnity of the example in the eyes of the people. The criminal himself too expects the decision, under all the heated anxiety of a gambling adventurer; and meets the perils of

<sup>c</sup> Vide Corn. Cels. in Præfat.

<sup>d</sup> Observations on the ancient Statutes, p. 353.



## PRINCIPLES

death in a state of mind, very unsuitable to the dictates and temper of Christianity.

The modern advancement of medical knowledge, and the benevolence of its professors, make such aids useless and ineligible.

\* \* \*

## CHAP. X.

### *A General Idea of the Connection between Punishments and Crimes.*

WHEN we follow the unrestrained course of our thoughts instead of laying down premises, and deducing conclusions from them, we reason from conclusions only: we begin our researches at the mouth of the stream, and thence investigate the spring.

The political liberty of a state consists in the security of the people; that security bears a proportion to the justice, and wisdom of the penal code, which protects innocence by the

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the chastisement of guilt. But the justice, and wisdom of every penal law depend on its analogy to the particular quality of the crime, to which it applies. The punishment then becomes an established consequence, unconnected with the caprice of authority, and flowing from the very nature of the offence.

It is not sufficient therefore to have stated the right of punishment, and the different classes of punishments; it is also necessary to consider the several species of crimes, their definitions and gradations.

The superstructure, as the most striking object, first caught my attention; it remains to examine the foundation.

The political liberty of a state consists in the security of the people; that security bears proportion to the justice, and wisdom of the penal code, which protects innocence by

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### CHAPTER XI.

#### Of Crimes.

§ 1. **CRIME** is distinguishable from sin: for every crime must be a positive breach, or wilful disregard, of some existing public law. But many offences against earthly authority are no otherwise sinful in the eye of Heaven, than as infractions of that implied contract of obedience to the legislature, to which every member of society is subjected; and there are many species of sin, which, in a legal sense, cannot be criminal, because in their nature not obvious to human accusation.

§ 2. The mere speculative wantonness of a licentious imagination, however dangerous, or even sanguinary in its object, can in no case amount to a crime. It is a passion inseparable from the essence of the human mind,

This distinction, says a learned writer of the last century, was known both to the Greeks and Romans, in the words *ἀναστροφή, ἥμισημα, Peccatum, Crimen.*



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to delight in the fiction of that, the actual existence of which would please.

Dionysius the tyrant is said to have punished with death one of his subjects, for dreaming that he had killed him. This was hardly more iniquitous, than the execution of the gentleman<sup>f</sup>, who, having a white deer in his park, which was killed by Edward the Fourth, wished the deer, horns and all, in the belly of him that counselled the King to kill it; "whereas in truth no man counselled the King to it;" or than the attainder, and execution of Algernon Sydney, on the evidence of private, and unpublished papers, without any proof, or even suggestion of their intended publication; without even an averment, that they were relative to the treasonable practices, charged in the indictment<sup>s</sup>.

§ 3 Crimes have no existence prior to the resolution to do some criminal act, and are punishable only when that resolution is

<sup>f</sup> Markham Ch. J. rather chose to quit his office, than consent to this. Baker's Chr. 229. Hale's Hist. P. C. i. 115.

<sup>s</sup> In which case it is thought, that they might have been read in evidence. Foster, p. 191.

capable of proof: but criminality even in this stage is only inchoate, and in all cases therefore, except treason, is treated with a moderated severity by our law; which benevolently supposes a possibility of recollection, and repentance, in every moment previous to the actual completion of the design.

This possibility was excluded by stat. 25 Eliz. which made it felony "to with or design the death, or deprivation of the Queen, or any thing to that effect."

*Qui deliberant, deservierunt*, said Tacitus. Sir Heneage Finch gave a bloody interpretation to this expression, when he inferred<sup>a</sup>, that "to doubt or hesitate in a point of allegiance, is direct treason and apostacy."

When the will is said to be equivalent to the deed, it should always be understood, that there hath been an actual, determinate endeavour, so far co-operating with the intention, that no new exertion of the mind could have intervened to prevent the effect of the crime; though that effect may casually

<sup>a</sup> State Trials, vol. ii. p. 230.  
Pufendorff, p. 782

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have failed: as if a man should stab another with intent to kill, though by the skill of the surgeon the wound should not prove mortal, or discharge a bullet at his head, though he should miss his aim.

§ 4. Thus every criminal charge must be founded on some fact, with the evidence of which every trial should commence. If that fact be established beyond the power of refutation, it then becomes necessary for the person accused to have recourse to the several suggestions, which are allowed by reason, morality, and religion, to be matters of mitigation or excuse.

We find in every system of laws a great variety of elaborate distinctions, on the different gradations from the completest guilt, which is the accumulated result of both fact and intention, to innocence, which consists in a total deficiency of a mischievous will.

The colour of the accusation assumes a new tint, whether the person accused be responsible, as principal or as accessory; whether principal in the first degree, as actual perpetrator, or in the second, as aiding and abetting:

G 4 whether



whether as accessory before the fact, or after; whether justifiable on the several pleas of misfortune, ignorance, or compulsion; lastly, if there be a want of discernment or understanding, there cannot exist a malignity of mind; for such persons the law itself should anxiously apologize, on the appearance of their incapacity, whether it arises from the course of nature, as in the nonage of infants; or from the visitation of God, as in the cases of idiots and lunatics.

But when the measure of proof is full; when the act and intention<sup>k</sup> have both co-operated to establish the guilt of the offender; when every possibility of extenuation or excuse is precluded; then, and not before, let the arm of justice be stretched forth, and let that penalty be rigorously inflicted, which the law hath proportioned to the denomination of the crime.

<sup>k</sup> By the common law, an intention to commit a felony amounted to the same crime in no instance. And therefore in the case of Holmes, who set fire to his own house in the city of London, with intent to burn the house of his neighbour; as the fire did not extend beyond his own house, this was adjudged not to amount to the crime of Arson. I shall hereafter have occasion to mention some particular statutes which depart from this rule. Holmes's case is in Cro. Car. 577.

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§ 5. It is impossible to delineate any systematic, or graduated scale of crimes, applicable to every legislation; for crimes are of temporal creation, and to be estimated in proportion to their pernicious effects on society. Municipal laws must be adapted to the temper and influence of the climate, the state of commerce, the occupations, number, and riches of the people; in short, to the nature, principles, and necessities of each particular government. The same fact is therefore liable to a different construction under every different legislation. Solon made idleness a crime; and this, in the infancy of a democracy so well regulated as that of Athens, was not unreasonable. In Holland it is a capital crime to kill a stork; but such a provision in the dry, mountainous parts of Germany would be grossly absurd. The safety of the ancient Gauls consisted in the mere brutal activity of their bodies: "it was criminal therefore, says Strabo, and punishable, for the young men to exceed the measures of their girdle, for it was conceived to be a proof of idleness and gluttony." In the warmer countries, which want the restriction of the true religion, we see polygamy established, or the use of seraglios permitted. Lawgivers  
are

are but men; and the wisest of them will too often be influenced by their constitutional passions, though perhaps insensibly, in the laws which they frame. But in the temperate climate, which we inhabit, where the sexes are equally qualified for the pleasures of sentiment; and where it is not unusual for the wife, the mistress, and the friend, to exist in the same person; such pluralities would as ill agree with the temper and disposition of the people as with the dictates of the religion which they profess.

§ 6. Crimes then being relative to the nature of each particular government, they are incapable of general definitions; but it is very possible to establish certain leading principles, which should be ever present to the attention of human jurisdictions.

The President de Montesquieu hath considered crimes, as prejudicial to religion, to morals, to the tranquillity of the public, and to the security of individuals. This division seems liable to objections, though it may not be easy to make a better. I shall avoid therefore the arrogance of the attempt, by pursuing the detail without any methodical division of the subject.

CHAP.



## C H A P. XII.

*Of Crimes relative to Religion.*

§ 1. Religion hath been wisely established by law, as useful and necessary to society; and is so wrought into the very frame of our government, as to become a main part of the constitution. The magistrate therefore, though the well-being of the state be his peculiar object, is by no means exempted from a due concern for the religion of his country.

§ 2. But it is no consequence from these premises, that men should be debarred liberty of conscience, and the free use of reason and inquiry; much less can any argument be drawn from them in favour of persecution. Freedom of thought is the prerogative of human kind; a quality inherent in the very nature of a thinking being; a privilege which cannot be denied to him or taken from him. Montaigne therefore had good cause for saying, in his familiar way, "that it is setting up one's own opinions very high, to direct another to be  
" roasted

“roasted alive for them.” He spoke feelingly; for all the states of Europe were at that time blazing with religious martyrdoms; and it seemed to be the fundamental principle of all sects to execrate and extirpate each other.

§ 3. Even England, the seat of national liberty and benevolence, became the bloody scene of intolerance and persecution; the ministers of peace and christianity were the active dispensers of death and desolation; and the perpetrators of the most malignant murders were clad in the pure mantle of religion.

The accomplished and sentimental Sir Thomas More caused Lutherans to be whipt, tortured, and burnt alive in his presence<sup>1</sup>. Cran-

It seems almost necessary to produce some instance in support of this assertion; and therefore I transcribe the following from Bishop Burnet, on whose historical fidelity we may rely as to all transactions except those of which he believed himself to have been an eye-witness. — “The clergy now resolved to make an example of one James Bainham a gentleman of the Temple: he was carried to the Lord Chancellor’s house, where much pains were taken to persuade him to discover such as he knew in the Temple who favoured the new opinions; but, fair means not prevailing, More made him be whipt in his presence, and after that he sent him to the Tower, where he looked on, and saw him put to the rack.” Bainham was afterwards burnt. *Hist. of the Reform.* vol. I. p. 165.

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mer led Arians and Anabaptists to the stake. Bonner, Bishop of London, tore off the beard of a weaver, who refused to relinquish his tenets; in another instance of the same kind, he scourged a man until his arm ached with the exercise; and held the hand of a third to the candle, to give him a specimen of burning, till the sinews and veins shrunk and burst. Even Wriothesly, the Chancellor of England, directed a young and beautiful woman to be stretched on the rack, for having differed with him on the real presence; with his own arm he tore her body almost asunder, and caused her afterwards to be committed to the flames. In fine, infants, born at the stake, were thrown into the fire with their parents, as partaking of the same heresy.

Human nature appears detestable under such representations; which (as they are well described by a philosophical writer) sink men below infernal spirits in wickedness, and below beasts in folly.

Henry the Eighth, whose caprice was the bloody standard of the national faith, ruled

It was made high-treason to believe this Prince to have been married to Anne of Cleves.



all sects by turns with a rod of iron: his scholastic subtilty was equal to his cruelty; and we are told, that, in one instance, he found sufficient reasons for sending three papists with three protestants, their companions, in the same procession to the stake. His daughter Mary, with less ingenuity, possessed the same rancorous and implacable zeal. And we accordingly learn, that in the space of three years, under the auspices of Bishop Gardiner, she committed two hundred and seventy-seven protestants to the flames. Human sacrifices were at this period more frequent in the metropolis of England, than they had ever been in either Carthage, or Mexico: and in all these instances, the future damnation of the heretic was believed to be the inevitable consequence of his death.

Ye rev'rend fathers,  
 Whose beards the silver hand of time had touch'd,  
 Whose learning, and good letters peace had tutor'd,  
 Whose white investments figur'd innocence,  
 The dove and very blessed spirit of peace,  
 Wherefore did ye so ill translate yourselves  
 Out of the speech of peace, that bears such grace,  
 Into the harsh and boisterous tongue of war,  
 And civil massacre? who shall believe  
 But ye misus'd the reverence of your place,  
 Under

## O P E N I A L L A W.

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Under the counterfeit zeal of God\*, and effect ill  
In deeds most damnable.\*?

This frenzy had subsisted here for more  
than a century: I find the following ac-  
count of the execution of Lord Cobham,  
A. D. 1418.

"Then was he layd upon an hurdle, as  
though he had been a moost heynouse traytoure  
to the crowne, and so drawne forth into  
Saint Gyles Felde, where as they had set  
up a new paire of Galowes. than he was  
hung up in a chayne of yron and so con-  
sumed alyve in the fyre, and so he departed  
hence moost christenly. how the priestes that  
tyme fared and cursed, requiring the peo-  
ple not to pray for hym, but to judge hym  
dampned in hell, for that he departed not

\* Deorum nomen prætenditur sceleribus. Liv, xxxix.

t. 16.

\* Shakespeare.

But it appears, from Godfridus Coloniensis, who  
wrote A. D. 1234, to have prevailed much earlier on the  
Continent. Eodem die, quo quis accusatus est, seu  
"juste, seu injuste, nullius appellationis, nullius defen-  
"sionis refugio, proficiente, damnatus, et flammis immol-  
"tur." This was founded on the following constitution  
of the Emperor Frederic: "Damnati per ecclesiam in  
"seculari relinquuntur, animadversione debita puniendi, et  
"ricis a suis ordinibus primo degradati." See also Mart.  
Paris, p. 429, and Hales Hist. R. G. i. 383.

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" in

“ in the obedience of the Pope, it were too  
 “ long to wryte. And thy was done in the  
 “ yeare of our Lord mcccc and xviii<sup>th</sup>.

The writ *de Hæretico Comburendo* seems to have been founded on the 2 Hen. IV. c. 15: it was first used with effect against William Sawtre, A. D. 1401, who had been condemned for heresy by the Convocation of Canterbury, and whose sentence had been confirmed by the House of Peers: it concluded in the following words, “ *ac ipsum hæreticum in eodem igne realiter comburi facias, in bujusmodi criminis detestationem, aliorumque Christianorum manifestum exemplum.*” This writ was issued so late as the year 1611, by James the First, against Bartholomew Legat<sup>s</sup>, an Arian, on a conviction before the Ordinary. Having subsisted three centuries, it was at last abolished, with all proceedings thereon; and all capital punishments in pursuance of ecclesiastical censures, by 29 Charles II. c. 9.

<sup>1</sup> See the tryal and examination of Sir John Oldcastle collected by John Bale.

<sup>2</sup> On which occasion it was adjudged by Fleming, Tanfield, Williams, and Croke, that the Diocesan may convict of heresy, and that thereupon the writ “ *de hæretico comburendo* may issue.” 12 Co. Rep. 92.



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It is perhaps to be wished, that this statute had gone one step further, and taken from the spiritual arm every exercise of penal jurisdiction.

I have given this detail of historical facts, merely as a subject of curious speculation. The banners of pious cruelty seem now to be for ever laid aside. Philosophy and benevolence are become the companions of religion.

§ 4. Still, however, and consistently both with reason and civil liberty, all intentional affronts to the national rites, and all manifest impieties vauntingly committed, are considered as criminal, and in their nature subject to the secular cognizance: yet not as crimes immediately fatal to society, and calling for the extirpation of the criminal; but as infractions of the public tranquillity, and disturbances of the established system.

The English legislature is now aware, that it is not the office of the magistrate to stir up the zeal, and blow the coals of persecution; that severity ought not in any instance to be extended to the peaceable exercise of

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different opinions; that the Law ought not to be made the scourge of conscience, nor compulsion to be added to intolerance. Misdirected piety is no longer within the province of our tribunals; though sometimes, from the principle of the civil establishment, properly subjected to certain civil disabilities.

“Hear this, ye nations;” and let not in any case the sacred truths of the Gospel be forced upon mankind by the contaminated hand of the executioner! let not in any case an unhappy attachment to hereditary religious errors, confirmed by the prejudices of education, be made a capital crime! The attempt to over-power by terrors the misapprehensions of the mind is unnatural and preposterous. Uniformity in opinion cannot be the result of force; general orthodoxy cannot be the creature of mandatory Law; nor can *“the pains of death in support of religion ever have any effect but to destroy.”*

§ 5. It would be uncandid however not to confess, that the Laws of England at this day subject Popish Priests, in many cases, to

perpetual imprisonment; in others, to the pains of high-treason. It is also high-treason "to pervert, or even to be perverted, to the see of Rome. A second refusal to take the old oath of Supremacy is liable to similar severity". Such Laws are rarely exerted; but their existence is a national reproach.

A free government may naturally hold in abhorrence a religion, the principles of which are founded in slavery; but a free government forgets its own principles, when it gives to involuntary opinion, the denomination and punishment of the most enormous guilt.

In that age of bigoted enthusiasm, when ecclesiastical tyranny was placed in competition with civil government; and when it was attempted, with impudent and unwearied diligence, to subject the internal Sovereignty of the realm to the supposed universality of the papal power; the indignation of our ancestors was at length awakened, and the unnatural position of "*imperium in imperio*" was encountered by many sharp and severe Laws. The motive hath ceased, but the effect; re-

\* Stat. 27 Eliz. c. 2

\* 3 Ja. I. c. 4. 23 Eliz. c. 1.

\* 5 Eliz. c. 1. § 11.



main: and our statute books are at this day crowded with inflictions of forfeiture, and perpetual imprisonment, (under the name of *præmunires*) on Papal provisors, importers of any *Agnus Dei*, crosses, beads, or other commodities of the church of Rome. Can it be a question, whether these laws ought also to be repealed?

§ 6. Sorcery, by the construction of the common Law, was a species of heresy\*. Under this idea, A. D. 1441, the writ *de hæretico comburendo* was issued against Margery Goodman of Eye in Suffolk; and she was accordingly burnt for consultation with the Devil. Witchcraft also was treated with extreme severity in very early times: in Scotland, A. D. 840, a Law was made to punish it by cutting out the tongue; and in England, by

\* "Sorcery et Devinal sont membres de heresie." Mirror, c. 1. § 5.—Fleta. "Christiani apostatæ, sortilegi, et hujusmodi, comburi debent." The word "*hujusmodi*," which in this sentence seems of a very alarming nature, is not more exceptionable than certain expressions, which frequently occur in the English statutes: such as "*divers other like kinds of miserable offences*." "*Any thing to the same effect*." "*Other offences of the like sort, &c.*" We frequently find the same vague appendix in the Roman Law. "*Aliudve quid simile si admiserint*."

† Concil. Brit. p. 37.

the laws of Æthelstan, A. D. 928, it was made a capital crime <sup>a</sup>. We find a presentment of sorcery *inter placita Reg. Rich. I.*; and in the Year Books there is an appeal of Necromancie in the 18th year of Edw. II. There are also many ancient writs in Rymer *de sortilegis capiendis*. It suited the sanguinary temper of Henry VIII, as well as the pedantry of James the First, to give written descriptions of this offence; we accordingly find very learned edicts against prophets, forcerers, feeders of evil spirits, charmers, and provokers to unlawful love <sup>a</sup>. Sir Edward Coke thinks <sup>b</sup>, “that it would have been a great defect in government, to have suffered such

<sup>a</sup> See also a Law temp. Hen. I. in Lambard, c. 71. William of Neuburgh, who wrote A. D. 1181, gives a very grave account of a witch who obtained a victory at sea in favor of Suerus King of Normandy, by commanding the waves to suck in the greatest part of the adverse fleet; “which was accordingly done.” P. 236.

On the 23d of August, 1728, several persons were burnt alive at a town in Hungary, *because* a large woman, who had confederated with them in the art of witchcraft, did not, when put into the scale, weigh more than four ounces.

<sup>a</sup> See the Roman Law “de his qui amatorium poculum dant.” Plutarch also exclaims warmly against women using  
“τὰ φιλῶν ὅτι διεπείσεν αἰς τὰ κατ’ ἀποδοῖν.”

<sup>b</sup> 3 Inst. 45.

devilish abominations to pass with impunity.<sup>1</sup> But the lawgivers of this generation have prohibited all prosecutions of a crime which doth not appear to have any existence; and have by the same statute ordered all pretenders to such preternatural abilities to be exalted on the pillory above the rest of mankind. *That knavery, which endeavours to impose on credulity, is surely a proper object of correction*; for which reason also, false and pretended prophecies are properly punishable, though they are too frivolous in their nature to require any extraordinary severity. They were punished capitally by 1 E. VI. c. 12; which was repealed by Q. Mary: and now, by 5 Eliz. c. 15, the penalty for the first offence is a fine of 100 l. and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment for life.

§ 7. It is not improper, under the title of this chapter, to consider crimes relative to marriage; which, though a civil institution, is stamped with the seal of religion.

9 Geo. II. c. 5.

Incest



Incest<sup>d</sup>, and adultery<sup>e</sup>, are vices so contrary to the well-being of a great and polished state, that one may wonder at the supineness of the English Law, which hath not subjected either as crimes, in any instance, or in any degree, to the temporal cognizance. Adultery is perhaps punishable by indictment<sup>f</sup>, as a scandalous and public indecency; but in no case as the infraction of a sacred tie, and tending to a general dissoluteness of manners.

This offence among the Saxons was punished by a fine, called Lecherwite, and Legergeldum. And we find in the Domesday book, "*quod adulterium faciens 8s 4d emendabit homo, et femina tantundem: Rex habeat hominem adulterum, Archiepiscopus fœminam.*" The Julian law of the Romans punished it also by fine;

<sup>d</sup> Tunc soror nati, genetrixque vocabere fratris,  
Nec quot confundas et jura et nomina sentis?

Ovid. Metam.

The crime of incest was punished with great severity by the Roman Law. See Dig. xlviii. 5. 38. 2. And this severity was even extended to the mode of prosecution. "*De servis nulla quæstio est in dominos, nisi de inceitu.*" Cic. Orat. pro Milone, c. 22.

<sup>e</sup> Oppida cœperunt munire et condere leges,  
Ne quis fur esset, neu latro, neu quis adulter. Horat.

<sup>f</sup> Comberbatch, 377. Tremaine's Pleas of the Crown, p. 209, and p. 213. State Trials, vol. iii. p. 52.

the law of Moses with death. Women committing adultery were by the Egyptians deprived of their noses, that they might not again allure men to wantonness; but I cannot learn that male offenders were liable to any corporal penalty. The wife's transgression in this respect is certainly more repugnant to the end of marriage, than the husband's; yet the sex of lawgivers influences the modes of punishment. A female Legislature, however inclinable to eradicate this offence, would hardly have had recourse to mutilation, as the most eligible expedient for that purpose.

§ 8. Polygamy is in our Law a felonious offence<sup>b</sup>, but entitled to the benefit of Clergy; by the laws both of ancient and modern Sweden, as also by the laws of Denmark and of Spain, it is punished with death. It certainly

<sup>a</sup> Levit. xx. 10.

<sup>b</sup> 1 Ja. I. c. 11. But it is provided by the third section, "that if any person, divorced by any sentence of the ecclesiastical court, shall marry again, the former husband or wife being alive, he or she shall not for such marriage be liable to the penalties of the statute." Yet such sentence of the ecclesiastical court is no dissolution à vinculo matrimonii; the second marriage is merely void, and the bigamy is in its effects as offensive to the interest of society in this case as in any other. The reason of this lenity is obvious, but unsatisfactory. For instances, see Sel. p. 271 1 Cro. p. 461.

is a gross species of adultery, aggravated by the profanation of a religious rite; yet the law, which ought to look upon the individuals of the community with the eyes of a mother upon her children, ought to be very sparing of the highest severities, when the milder class of restrictions may suffice. In France it is punished by sentence to the galleys, or by temporary banishment.

By the ancient law of England, Christians marrying Jews were *burnt*<sup>1</sup> alive.

§ 9. It is made a felony by a late statute to solemnize clandestine marriages<sup>k</sup>. The crime is indeed prejudicial in its consequences to the public police and œconomy: yet it might perhaps have been sufficient to have made all such marriages void, or to have subjected the offender to pecuniary forfeitures, or civil disabilities.

§ 10. Sacrilege formed a very extensive article in the Roman law, and was accounted

<sup>1</sup> I have transcribed this expression from Sir Edw. Coke, 3 Inst. 89. but it is evidently a mistake. "*Contrabentes cum Judæis, Judæabus, pecorantes, sodomitæ, vivi confodiantur.*" *Flota*, l. i. c. 35.

<sup>k</sup> 26 Geo. II. c. 33.



more odious than treason! — The English statute-book draws no distinction of guilt from the holiness of the place, or persons offended; except in the crime of robbing a church, or chapel, which is excluded from the benefit of clergy by an act of Henry the Eighth; the fact however must be accompanied by an actual breaking<sup>m</sup>. By an Athenian law<sup>n</sup>, a man committing this offence was banished with all his children. It was also a maxim of the civil law, *quod delicta capiunt incrementa a loco, sive ratione loci in quo committuntur*<sup>o</sup>. By the laws of King Canute<sup>p</sup>, “if murder be committed in a church, a full compensation shall be paid to Jesus Christ, another full compensation to the king, and a third to the relations of the

<sup>1</sup> *Proximum sacrilegio est quod Magistratis dicitur.* L. i. ff. Leg. Jul.

Yet we are told that in the temple of Diana at Aricia near Rome, whoever killed the chief priest was intitled to become his successor; a most unaccountable privilege!

*Fanum in loco est, et perfuga, sacerdos ibi constituitur, qui sacerdotem suum trucidaverit manu; Aristoque semper gladio paratus ad insultus propulsandos circumspicit.*

Strabon. Geogr. l. v. p. 366.

*Ecce suburbanæ templum nemorale Dianæ,*

*Partaque per gladios regna nocente manu!*

Ovid. Art. Am. i. 159.

<sup>m</sup> 2 Hawk. 351.

<sup>o</sup> ff. l. xvi. § 5.

<sup>n</sup> Meursius, l. ii. c. 2.

<sup>p</sup> Lambard's Collection, Law 2.

deceased,”

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deceased." And in the 8th year of Edw. IV. it was attempted to make sacrilege high-treason, subjecting the offender to be burnt. A petition, the common method of tendering bills for the royal assent, was presented to the king for that purpose by both houses. To this extraordinary request the king returned an answer, becoming the royal majesty of the crown, "*Le Roy s'avisera*."

### CHAP. XIII.

#### *Of Crimes relative to the Law of Nations.*

§ 1. **T**HE law of nations is founded partly on the suggestions of natural equity, partly on positive stipulations. It is universal in its extent and operation through the civilized world; and supported by the general consciousness of its general Utility.

Individuals are required to give their acquiescence to this law, not as a matter of

\* Cotton, 684.

Foster, p. 192.

choice,

choice, but of obligation; and it is the province of legislators to force that acquiescence, if kept back or neglected. For the faith of nations in their collective capacities would be of little avail, if private subjects were allowed to use hostilities and treachery towards each other; mutual distrust, insecurity, discord, and war, would follow. *Vim volumus extinguere? jus valeat necesse est?* If the views of each individual were permitted to terminate in selfishness, the misery of all would be the consequence; the stability of a building depends on the united support of its corresponding parts.

This law becomes precise and definitive, in proportion to the continued intercourse of nations; and the complication of their mutual connections. I am not however to consider those multifarious rules of equity, which have been tacitly established in the conduct of war and commerce; such as, declarations previous to hostilities, the prohibition of poisoned weapons, capitulations, safety of hostages, suspensions of arms, maintenance of

Orat. pro Sext. c. 42.

*Quam legem exteri nobis posuerunt, eandem illis ponemus.* Steirnhook, de jure Sueonum, l. iii. c. 4.

truces,



truces, the privileges, regulations, and restrictions of merchants. I confine myself merely to the penal cognizance of states internally respecting the rapaciousness and malice of Natives in their conduct towards Aliens. The crimes founded thereon are reducible to a small compass.

§ 2. Offenders against the rights and privileges of Embassadors, by arresting their persons, or distraining their effects, are deemed violators of the Law of Nations; and, by a modern act<sup>u</sup>, made liable to such penalties, or corporal punishment, *as the Chancellor and the two Chief Justices shall think fit*<sup>w</sup>: a strange, and unlimited discretionary power! abhorrent from the principles of a free government; unlikely indeed to be abused, but improper to be given. It would be easy to establish a less exceptionable sanction to that reverence which is due to the representatives of kings. This act is said to have

<sup>u</sup> Stat. 7 Ann. c. 12.

<sup>w</sup> The same indefinite legislative Authority, as to military punishment, is annually given to the King, by the Mutiny Act, which empowers "his Majesty, to form Articles of War, and constitute Courts-martial, to try any crimes by articles, and inflict such penalties as the articles direct." But this cannot be extended to affect life or limb. Commentaries, B. i. 415.

been

been made under mortifying circumstances, as a kind of public satisfaction to the Czar Peter; whose ambassador, Mateof, had been arrested in London for debt, and obliged to have recourse to the other foreign ministers to give bail for him. It seems hardly credible, that the characters of ambassadors should have wanted this sanction in England in the 18th century. Mr. Whitworth was also sent with a solemn apology to the Czar, in which he told him, says Voltaire \*, "that the Queen had imprisoned the persons, who had presumed to arrest his ambassador, and that the delinquents had been rendered infamous;" assurances, which if they ever existed, had certainly no foundation in fact.

§ 3. Truce-breakers, and violators of safe conduct, are by a statute of Henry the Fifth declared guilty of high-treason against the King's crown, and dignity †. It seems to be the better opinion ‡, that this was repealed by the subsequent statutes of Edward Sixth, and of Mary. The punishment was certainly extravagant; but the milder law of Henry the Sixth relative to the same crime, which

\* Hist. de Ross. c. 19. † 2 Hen. V. c. 6.

‡ Commentaries, B. iv. p. 70. § 31 H. VI. c. 4.

still remains in force, is too vague and indeterminate.

Commercial countries naturally shew a peculiar tenderness to the persons and property of foreigners. "It is a beautiful circumstance," says Montesquieu, "that the English nation made the protection of merchant strangers a principal article in the great charter of her liberties:" the most benevolent indulgence was also shewn by our law to the proprietors of distressed and wrecked vessels, at a very early period, when it was permitted

There was a degree of national wisdom in the clause to which Montesquieu alludes, and which may be found in 9 H. III. c. 30. It must however be acknowledged, that the internal Hospitality of England doth not appear to be of great Antiquity. I shall transcribe a part of the oath, which Bracton records, as necessary to be taken by all persons above fifteen years of age: "*Jurabunt etiam, quod nullum de nocte recipient in domum suam ad hospitandum, nisi bene notus sit: et si forte ignotum aliquem hospitaverint, quod non permittent eum in crastino recedere ante clarum diem, et hoc sub testimonio trium vel quatuor virorum.*" L. iii. c. 3.

At the same time, it should be observed, that the latter part of this transcript relates merely to the police of the kingdom, which in the early periods of our history was extremely strict.

The hospitality of the ancient Germans was remarkable. "*Quemcumque mortaliū arcere tecto nefas habetur. Notum ignotumque, quantum ad jus hospitii, nemo diffinit.*" Tacit. de M. G. c. 21.

It



mitted to other nations, in naufragorum miseria, et calamitate tanquam vulvres ad prædæ currere. This subject is certainly connected with the law of nations; but I shall only observe further upon it, that it hath been thought necessary by a very modern act to make all plunderers of distressed or stranded ships guilty of felony without benefit of clergy<sup>d</sup>. This act was indeed essentially necessary to infer criminality on the plunderers; since Larceny could not at common law be committed of treasure trove or wreck, till seized by the King, or him who hath the franchise; for till such seizure no one hath a determinate property therein. It is also necessary to make the stealing of furniture, above the value of twelve pence, from lodgings, require the punishment of death<sup>e</sup>; the plundering of wrecks, aggravated as it is by the unfeeling

It is said in the "Observations on the ancient statutes," p. 22, that the Welsh laws gave no protection to the Stranger. Tres sunt homines quibus multa non debetur pro injuria eis illata: 1. Purius, 2. Alienigena, 3. et Leprosus. But I apprehend that the subsequent Statute had displaced the learned Writer's notice. "Rectum legitimum, ac iustum, prius competit, et is qui injuriam illis intulerit multa publica obnoxius erit." Leges Wall. p. 330.

<sup>d</sup> 26 Geo. II. c. 13.

<sup>e</sup> Comment. B. iv. 234.

<sup>f</sup> 3 and 4 W. and M. c. 9.

neglect

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neglect of that sacred respect which is due to the unfortunate, certainly is not entitled to mercy. But arguments from analogy lead to bloody consequences in the framing of penal laws. By the code of the Visigoths, he, who took the opportunity of fire or shipwreck to steal goods, was obliged to restore fourfold<sup>a</sup>.

The above-mentioned act hath made it a capital offence to put out false lights, with intention to bring any ship into danger. The crime is undoubtedly heinous in its nature, and may be dreadful in its consequences; but the punishment of death should be inflicted rarely, and with great caution, upon the intention, where it is not followed by its Effect. It was thought sufficient to punish the destroyer of stated sea-marks with a penalty of 100 l. or outlawry<sup>b</sup>.

§ 4. Piracy is a species of robbery, or unauthorized depredation on the seas. The wars of nations are in all cases unhappy, but often legitimate, even when offensive, being founded in the principles of self-preservation. For the life of nations resembles the life of

<sup>a</sup> L. vii. tit. 2. § 18. <sup>b</sup> 8 Eliz. c. 13. § 4.

man, and the right of self-preservation frequently induces the necessity of beginning the attack. It is not so with freebooters and pirates, who are to be considered as unprovoked enemies, or rather as beasts of prey, to be hunted down by the universal concurrence of mankind.

This offence, by the common law of England, was a species of Treason, except when committed by aliens; but punishable only as such, when the act, if committed on land, would have amounted to a capital crime. The statute of treasons left it a Capital felony only. The descriptions of it have been much extended by modern acts of parliament<sup>1</sup>; and it may be doubted, whether some offences are not described therein, and punishable as piracies, which have no connection with our ideas of that offence. "Any commander or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods, shall be adjudged a pirate: and the trading with pirates, or in any wise corresponding with them, and the forcibly boarding any merchant vessel: though without seizing and carrying her off,

<sup>1</sup> 11 and 12 W. III. c. 7. and 8 Geo. I. c. 24.



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and destroying or throwing any of the goods overboard," are all under these acts deemed proofs of Piracy.

*The misapplication of terms in the framing of penal Laws is dangerous to liberty.* And this consideration reminds me of another modern statute<sup>k</sup>, which infers the guilt of high-treason on all those, who shall knowingly make, or mend, or shall have in possession, any instrument *proper only* for the coinage of money.

The Laws of Henry the Eighth were not more preposterous, when they gave the appellation of treason, to the stealing of cattle by Welshmen, to the deflowering of his Majesty's Aunts and Nieces, and to the bare solicitation of the chastity of his Daughter; nor the ancient law of Edmund, which made mere Fornication with a Nun punishable as homicide<sup>l</sup>.

<sup>k</sup> 8 and 9 W. III, c. 26. made perpetual by 7 Ann. c. 25.

<sup>l</sup> Auxij se trouva inter les leis de St. Edmond quondam roy deus cest realme, cest ley; s. Qui cum nunra vel sanctimoniale fornicetar, emendetur sicut homicida.

Stauford, p. 23. B.

It was well observed by Tacitus in regard to Augustus, "*Quod culpam inter viros ac faminas vulgaram, gravi nomine, Cesarum relictum ac violatae majestatis appellando, clementiam maiorum, suasque ipse leges egrediebatur.*"

### C H A P. XIV.

#### Of Treasons.

Hence it follows, that high treason, which is against the Majesty of the Sovereign, is a crime of the highest nature. But the personal protection of Majesty against the efforts of disloyalty is within the province of human foresight, and should be within the first sanctions of positive law.

Many are the sleepless hours which the Sovereign must undergo, infinite is the heart-ease which he must neglect, for the sake of his subjects. His preservation becomes in return the primary object of their care. And thus it is, that the reciprocal duties of protection and allegiance form the foundation and support of the political union. — Justice watches, like a guardian angel, over the rest.

# PRINCIPLES OF PENAL LAW.

let's pillow of her defender: for every blow, levelled at him, is, in its consequences, levelled at the whole civil establishment. The general Welfare of the people is blended in the safety of their common father, and representative; nor can his life fall a sacrifice to conspiracy or faction, without involving the whole realm in popular inveteracies, blood, and desolation.

Hence it follows, that high treason, which, in every instance, strikes ultimately at the well-being of sovereignty, is the foulest crime that can be committed; because it is of all crimes the most audacious in its nature, and the most extensively pernicious in its consequences. But the foulest instance of this crime is that, which aims directly at the royal person; because it is the most fatal and most entire renunciation, of faith, duty, subjection, and allegiance.

The peculiar jealousy of mankind on this point is such, that, in every known system of laws, the mere imagination of the crime, when evidenced by any external action, is ranked in the same degree of guilt, and subjected to the same degree of punishment, as the actual completion of the Treason; not be-



cause the idea is deemed equivalent to the perpetration of the fact; but because the severest chastisement, within the possible dispensation of the lawgiver, is thought due to the malignity of the intent—“*Eadem severitate voluntatem hujus sceleris, quæ effectum puniri jura valuerunt*”<sup>m</sup>; Such were the words of the Roman Law, which did not suffer the crime of high treason to be extinguished even by the death of the criminal<sup>n</sup>; but with an unjustifiable singularity extended the prosecution to his corpse, and the forfeitures to his representatives and heirs.

The

<sup>m</sup> Cod. ad leg. Jul. l. ix. t. 8. l. 5.

<sup>n</sup> *Extinguitur crimen mortalitate, nisi forte quis majestatis sit reus: nam hoc crimine, nisi successoribus purgetur, Hereditas fisco vindicatur.* ff. ad Leg. Jul. Maj. l. xi.

*Alienationes, quas fraude vel jure aliquis fecerit, ex eo tempore quo de invidiâ factione cogitaverit, nullius esse momenti statuimus.* Cod. ix. 8. 5.

*Nam ex eo tempore quo hanc cogitationem subiit, propter cogitationem dignus est pœnâ.* Cod. ad L. J. vi.

In England a person slain in open undoubted rebellion is not liable to any forfeiture; for the benevolence of our law always presumes the possibility of a defence known only to the criminal; and on the same principle, if even after conviction and judgement the offender should become insane, his execution shall be stayed; for, were he of sound mind, he might perhaps alledge something in stay of the proceeding. The 33d of Henry the VIII. c. 20. directed, in cases of treason, the Lunatic to be tried and executed, *“his lunacy and madness notwithstanding.”* but this act was repealed.

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The old laws of the Lombards punished as a Traitor "any Man, who should conceive a thought against the soul of the King:" the same Laws punished the marriage of any woman, that had taken a religious habit, "every such woman being precontracted as the spouse of God." The pruriency of a figurative imagination ought not to be indulged in the composition of penal laws; poetical license in the description of crimes leads to sanguinary consequences.

The last observation is in some degree applicable to the statute of Edward the third, which is at this day the standard measure to the people of their duty to the Sovereign. The first clause of that statute is in the following words, "When a man doth compass or imagine the death of our Lord the King, of Madam his Companion (consort), or of their eldest son and heir." This was declaratory of the Common Law of the realm,

repealed. There is good sense on this point in the Grand Coutumier, "Si aliquis extra mentem constitutus judicem memit aliquem interfecerit aut mebragmaverit, perpetuo carceri est mancipandum." fol. 13.

"Siquis contra animam regis cogitaverit,

Book II. tit. 57.





W. H. A. N. I. I. H. A. W. 1871

It is then, and hath ever been, the law of England, to punish a mere intention to kill the King, more severely than the actual and most wilful murder of a private subject; but the guilt commences only, when some measure shall appear to have been taken to effectuate the guilty purpose. An mere concealment, or a treacherous confederacy with some persons, as among the Romans, and among the Jews, there must be alledged, who proved, some declaratory of the intention, some positive participation in the guilt, some contribution, persuasion, or means of incitement. Advice given in a treason merely inchoate, and never executed, will make the adviser a principal in the treason. A lending of letters, or the caution of Sir Edw. Coke. The adverb (saith he) hath a great force, and signifieth a direct and plain proof: which word the King, Lords, and Commons did use, for that the offence was so heinous, and "was so heavily and severely punished, as none other the like. Note the word is not in English, nor in the common argument might have served a last, and a better, as Job in Hebrew, P. Q. R. S. T. U. V. W. X. Y. Z. is good, and signifies in interpretation, it is good for long, as long, it is all. Even the same, or the same, is obliged, to be written, by God, and now, say, in the no; yet it is for his name, so be said, indefinite, and is in a dangerous position, that no man can do anything, or anything, to show his obedience and approbation at the traitor's design, which is in his High Treason, as K. L. M. N. O. P. Q. R. S. T. U. V. W. X. Y. Z. the

preparation of weapons, or poison, in contemplation of the crime; treasonable printing or writing with publication; or unpublished writings, if relative to the practices charged in the indictment; words explanatory of an act, or spoken in prosecution of a traitorous purpose; are all matters of proper, and competent evidence, to be offered in proof. But the open deed, to be shewn at the trial, must be specifically, and correctly charged in the indictment, that the person accused may be prepared to refute, explain, or defend it. And an open deed, not so charged, cannot be given in evidence, unless it conduce to prove one that is so. This rule, in cases of treason, is founded on a positive provision; but it hath ever been the wise and equitable practice of our courts, in other criminal prosecutions, to reject all manner of evidence, unconnected with the point in issue. A multiplicity of distinct and independent facts, however tending to the same inference, might infensibly confound the attention of the person accused, baffle the plan of his defence, and influence the disposition of his judges.

\* Foster, p. 200.

† State Trials, vol. v. p. 221

But there are other open deeds of a more explicit kind, which come within the idea of compassing the King's death, though in themselves (and under express statutes so described) distinct species of treason, and liable, as such, to be charged and proved. Thus, levying of war; and, under certain limitations<sup>a</sup>, conspiring to levy war; concerting with foreigners and others in order to an invasion of the kingdom; entering into measures for deposing the Sovereign; may always, and in some cases must<sup>b</sup>, be charged, as overt acts of compassing. Again, the actual murder of the King operates in legal evidence, only as an overt act to prove the compassing of his death<sup>c</sup>. To the same purpose may be shewn an overt act of conspiracy to imprison the King, or to restrain his person by force. Here the law presumes, that when respect is so far forgotten, the more sacred duties of allegiance will soon be obliterated in blood;

<sup>a</sup> Foster, p. 213.

<sup>b</sup> This was the case of Cardinal Pole, who was said to have written a book for that purpose to the Emperor Charles. Co. P. C. p. 19.

<sup>c</sup> For example, a combination with foreigners in amity with the kingdom, cannot possibly be brought within any other clause of the statute; nor will a mere conspiracy to levy war amount to treason, unless particularly pointed against the person of the King, or his government.

<sup>d</sup> Kelyng, p. 8; The case of the Regicides. 1 Hawk. 34.



and history proves, that prisons are generally the slaughter-houses of Princes. The instance of a Monarch, conducted to the scaffold after all the solemnity of a trial and judgement, in the open day, in the presence of his people, with all the apparatus and formalities of a penal execution, is without a parallel.

§ 6. The second species of treason in this statute is, "when a man doth violate the King's comfort, or his eldest daughter, unmarried; or the wife of his eldest son and heir." Violation here implies a carnal knowledge by whatever means obtained, and is made a treasonable act for very solid, satisfactory, and evident reasons. There are certainly inaccuracies in the wording of the clause, but perhaps they are immaterial. The wife of the second son is not within the statute, though her issue is inheritable in preference to the eldest daughter, neither doth it seem treason to violate the eldest daughter, that hath been married, such violation not being

within the letter of the statute, though without the reason. The common law extended the same sanction to *all* the daughters.

In the construction of the last-mentioned clause, it hath been the unanimous inference of all the writers on the English law; that if both the parties be consenting, they are "equally guilty of treason;" consequently, that a Queen consort committing adultery commiteth treason; and the cases of Queen Anne Boleyn, and of Catharine Howard, are referred to, as the grounds of this opinion.

It is submitted with great diffidence, that a different conclusion ought to have resulted from each of those cases.

Anne Boleyn's judges would very cheerfully have given the appeal to the wife of the King.

*See* *1st*, iii, 2, *Hale's Hist. P. C.* 124, *Commentaries*, B. iv. 81.

The law, which certainly is not warranted by the most strict maxims of justice, seems to have arisen from the manuscript report of Judge Spelman, "of matters relative to the trial of Anne Boleyn," which, I believe, is now in the possession of Sir D. Cole. See his opinion thereon; and Bishop Burnet, who wrote his account from Spelman, observes, that "there would have been no need of stretching the law to make it apply to the Queen; for she would have proved herself guilty of the known statute 25 Ed. III. which would have been sufficient."

lation of burglary, piracy, or horse-stealing, to the crime of which she was accused; but, in fact, she was executed under the strained construction of an inadvertent expression. She was proved to have said to her servants, "that the King never had her heart," which was charged to be slanderous to the issue begotten between the king and her. She was convicted therefore on a statute made two years before, declaring it treason to throw slander on the King, Queen, or their issue. "So that, saith Bishop Burnet, the law that was made for her, and the issue of her marriage, was now made use of to destroy her." An act of parliament was soon

§ 25 H. VIII. c. 22. § 8. Bishop Burnet, vol. i. p. 202. And Hume's Hist. vol. iii. p. 207. Stow 557. Hall 227.

In her, saith Lord Herbert, were eminent the most attractive perfections. Beauty indeed is not always the best keeper of itself; yet she was thought both moderate in her desires, and of discretion enough, to make her capable of being trusted with her own perfections. I do reject all those therefore that would speak against her honour, in those times they staid in France; but I shall as little accuse her in this particular of her affairs. In this time; it is enough that the law hath condemned her. No cause hereof is related yet, unless that at a tournament she let fall a handkercher, wherewith some one, supposed to be her favourite, wiped his face; and that this was perceived by the King. But suspicion to great minds is like a tempest, which, though it scarce stir



soon afterwards made to declare her marriage to have been unlawful, "for that his Highness had chosen to wife the virtuous and excellent Lady Jane; who, for her convenient years, excellent beautye, and purenesse of fleshe and bloude, would be apt, God willinge, to conceive issue by his Highnesse." As to Catharine Howard, she was beheaded under an expresse statute of attainder, upon petition of both houses of parliament to the king, "that he would not vex himself, but give his royal assent to what they should do." Her grand-mother the Dutchess of Norfolk, with twelve persons more, was at the same time attainted of misprision for having concealed her vicious life, which they were supposed to have known previous to her marriage. The same act required all, who hereafter should know, or

vehemently stir low and shallow waters, when it meets with a sea, both vexes it, and makes it toss all that come thereon. The Archbishop of Canterbury, in a consistory letter to the King, wrote as much in her behalf as he durst. The King solemnized his intended marriage three days after her death, *not thinking it fit to mounn long for one the law had declared criminal.* Hist. of Hen. VIII. p. 285, and 440.

Stat. 33 H. VIII. c. 21. Herbert, p. 538.

But not under the pains of high treason, as misconceived by Mr. Hume, vol. iii. p. 248, or under any other penalty.

vehemently presume, any condition of lightness of body in her which should be Queen, to disclose it to the King, or Council; at the same time "prohibiting every one to blow it abroad, or whisper it to others."

The ingenuity of this parliament went farther; for they not only made it treason in the Queen to have committed an act of incontinency, prior to the marriage, without previously revealing it; but they extended the same guilt to all concealers of that incontinency; and also made it treason in the Queen to make advances of gallantry after marriage, by writing, words, tokens, or otherwise, though not followed by any effect.

It is somewhere well observed in regard to Henry the Eighth, that he never spared man in his wrath, nor woman in his lust. To the impulse of such motives we must attribute, that endless variety of sanguinary laws which punish: the clause was merely a peremptory protection to the informer, against the words of the statute, under which Anne Boleyn had suffered.

All these provisions are in the same statute; the censure cannot be presumed to have retained any remains of shame; yet it is observable, that it was not entered on the roll.

were

# OF THE COMMON LAW.

was esteemed during his reign in opposition to all the influences of natural affection, the ties of confidence and the sentiments of faith and decency.

The passive pliability of parliaments in that age was wonderful. It was hardly told in his prayer, when the Protector Somerset in order to engage the shew of approbation of the people, obtained the repealing Stat. Edw. VI. c. 12. which recites in the preamble, "that it had been necessary in the time of the late King to make many laws, which might appear to men of exterior realms, and to many of his majesty's subjects, very strait, fore, extreme, and terrible; though they had not been without great consideration, and policy, moved and established. But as in tempest, or winter, a thicker and warmer garment is convenient, so in calmer, warm weather a more liberal and lighter garment, &c."

In like manner the 1 Mary, c. 1. recites, "that many laws had been made by which learned and expert people, and sometimes the people themselves, were oppressed and snared, therefore &c."



Thus all these forced, and strange effects of Henry's invention were abrogated by the first acts of his children; and the doctrine of treasons was once more reduced to the standard of the 25 Edw. III.

§ 3. The next treason, mentioned in that statute, is of a more outrageous nature, and tending more immediately to break all the bands of government; I mean "the levying of war against the King in his realm." Under this description, a mere conspiracy to levy war, unless directly against the King, is not treason; but in a conspiracy for more remote purposes, if war be actually levied by some of the conspirators, they are all considered as principal traitors.

The words of the statute seem to imply a military assemblage, or armed insurrection; not upon a private quarrel between powerful individuals; not in maintenance of a personal claim, or in pursuit of a particular redress; but such a rising, as may, in judgement of law, be intended to have been against the person of the King, to seize, dethrone, or imprison him; or to oblige him by violence, to alter the measures of his government, or to compel

compel a change in the religion settled by law, or to withhold castles or fortresses by weapons offensive and invasive; or, lastly, a wilful joining with open rebels, in which case force is no excuse, unless applied immediately against the person, or exciting instant fear of death. For if the fear of having houses burnt, or goods spoiled, or of other collateral injury, were a sufficient plea, it might be in the power of any leader to indemnify all his followers. And this pretext of personal apprehension is most strictly construed: for at the trial of Axtel, who commanded the guards at the execution of King Charles, when he alledged in justification, "that he had acted only as a soldier and under the command of his superior officer, whom he must obey or die;" it was answered by the court, that "where the command is traitorous, there the obedience to that command is also traitorous".

It is not for private subjects, misguided perhaps by ignorance, and heated by faction, to determine the proper moment of resistance against supposed violations of fundamental

<sup>a</sup> Macgrowther's case. State trials, vol. viii, p. 56.  
Kelyng, p. 13.

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laws, subversions of the constitution, and breaches of the original contract.

For never yet did insurrection want  
Such water colours to impaint her cause;  
Nor moody beggars, starving for a time  
Of pell-mell havock and confusion.

The infatuated misconduct of princes may certainly induce a crisis, in which the rising of the nation, as one man, is not only justifiable, but laudable, and glorious; but such a crisis is to be decided by the united voice of the Society at large, not by the partial dissonance of clamorous individuals. One may admire the courage, but it would be difficult to justify the conduct, of Flavius the Tribune, so finely recorded by Tacitus;  
*Dein postquam urgebatur, confessionis gloriam amplexus, interrogatusque de Nerone, quibus causis ad oblivionem sacramenti processisset:*  
“*Odenam te, inquit; nec quisquam tibi fidelior*  
“*militum fuit, dum amari meruisti.*” *Odise*  
“*cepi, postquam parricida matris et uxoris,*  
“*arriga, et bisitio, et incendiarius, extitisti.*  
Had the attempt of Flavius succeeded, he would have deserved to be treated as a trait-



terous assassin. For though the character of Nero was undoubtedly most detestable; yet the person of the prince is in no case liable to chastisement from the hand of a private subject. Dreadful indeed would be the condition of Sovereignty, if a contrary doctrine were tolerated.

It seems, on the whole, to have been the sole object of this clause, to suppress, and punish the daring efforts of *positive rebellion* against the administration of government, or the person of majesty; and this description might, in strictness, be thought to comprize every possible case, within this species of treason. But the idea hath, in the course of years, been extended with great liberality of interpretation.

A rising with intention to kill one of the privy council; a tumultuary combination to compel the King to put away his ministers; an armed force with a *general purport* to destroy inclosures, to deliver prisons, or to demolish bawdy houses, or to pull down meeting houses of dissenters, (in which cases the uni-

\* Talbot's case, 17 R. II.

\* Earl of Essex's case.

- 1 Old Bailey Trials, 1688.

Hale's Hist. R. C. 134.

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 verality of the design is continued into rebellion; lastly, insurrections to effect redress of innovation of public and general concern, in which the insurgents have no special interest, or forcibly to render ineffectual any act of parliament, or law of the realm; are all severally adjudged to be a levying of war within the statute.

The recital of this last very general head of contravention will naturally bring to the reader's recollection one of the articles of the mutiny act; which receives the annual sanction of parliament, and makes "the disobedience of legal orders punishable by death." Such precarious, undefineable classes of crimes, have a necessary tendency to destroy the confidence of the subject, and to give an arbitrary power to the Judge.

As to the other enormities above-mentioned, the constitution hath certainly intrusted the first, and proper exertion for the redress of grievances to the high court of parliament; yet to the eye of humanity it will appear doubtful, whether certain offences have not

occasionally received the hard denomination of rebellion, which might more properly have been punished as trespasses, misdemeanors, and riots.

It is by no means the temper of modern Judges to encourage arguments of implication to the extension of penal laws; I shall transcribe the concurring sentiment of the learned and benevolent Sir M. Hale, with particular regret in this instance, that his manuscript remained so long unpublished.

"We must acquiesce in resolutions when made and settled: but in my opinion, if new cases happen for the future, that have not an express resolution in point, nor are expressly within the words of the 25 E. III. though they may seem to have a parity of reason, it is the safest way, and most agreeable to the wisdom of that great act, first to consult the parliament, and have their declaration; and to be very wary in multiplying constructive, and interpretative treasons; for we know not where it may end."



§ 4. The statute proceeds to describe the fourth species of treason, which consists in "adherence to the king's enemies." The description of this offence had been in the same words near 200 years before, whenever any Norman quitted for France the allegiance due to England; and the style of forfeitures under King John was, "*quia adhaerit inimicis nostris in Normannia*."

By "enemies" are meant all aliens in notorious hostility." The solemnity of a previous denunciation of war is not always necessary; as in the instance of general letters of marque and reprisals; and sometimes it is impossible, as in the emergency of a sudden invasion. That the persons adhered to were enemies, is a matter of fact proper to be averred, and evidenced by its public notoriety.

Furnishing money, arms, ammunition, and provisions, or sending intelligence to the king's enemies, are all in reason, and consequently in law, acts of adherence; even though they should be intercepted in their

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passage ; for the treason, though ineffective, is complete on the part of the traitor.

A subject of the enemy-country, continuing under the protection of England, and practising, whilst in England, to the aid and assistance of that enemy-country, comes under the words of the statute ; but mere residence in a hostile kingdom is not in itself an adherence, though a refusal to return to the mother country upon proclamation may be evidence thereof.

Other acts of adherence are, actual war against the king's allies, the treacherous surrendering in collusion with the enemy of a place of defence, a voluntary oath of fealty to the enemy king, or cruising under his commission, though without any absolute act of hostility.

§ 5. To a speculative mind, unbiassed by the habitual warpings of positive law, I may now appear to have considered all the treasons, which can exist, as mediately or immediately

Gregg's case, A. D. 1707.—See Burnet's History.—and Dr. Hensy's case in B. R. 31 Geo. II.—Foster, 218.  
\* State Trials, vol. v. p. 22. B. W. III. Trial of Capt. Vaughan, who was executed for this offence,

relative

relative to the person of Majesty, and the safety of the realm. But disgusting as the task is, it seems necessary to make some mention of a great variety of other delinquencies, which, by the statute of Edward the Third, and by subsequent acts of parliament, have been branded with the hard denomination and heavy penalties of high-treason.

It was consistent with the scholastic subtlety of some, and the credulity of others of our ancestors, to argue and to believe, that a misapplication of the royal prerogative by a subject amounted in guilt to an usurpation of sovereignty; and that an abuse of the king's image, though merely with a view to private gain, ought to be considered as the most traitorous disaffection to the person of Majesty.

On these principles the statute proceeded to make it treason "to counterfeit the king's great or privy seal, or the king's money; or to bring counterfeit money into the realm, knowing it to be false." Nor doth this pro-

The extravagance of this idea among the Romans was such that Severus and Antoninus found it necessary by Rescript to declare, that if a Person in throwing a stone should by chance strike one of the Emperor's statues, he should not, on that account, be liable to prosecution for Treason," ff. l. v. ad Leg. Jul.

vision



coin appear to have lain dormant; for we find a frequent mention of its effects in the writers of that age; and on one occasion in the subsequent reign, before Birknap, Skipton, and others, apud Lincoln, *Septem fabras memorabiles fuerunt, et suspensi sunt quidam vicarii de Wintonia voluntatis et iudicatus erat ad penam mortis* heavy

But still the offences of clipping, filing, lightening, and impairing, were not expressly described; yet they were found equally pernicious to trade, and equally affronts to the image of sovereignty, although not such immediate usurpations of its attributes. To settle the doubt therefore, and not merely as a new law, all such diminutions were declared to be high treason. And indeed clipping seems to have been a crime of a very serious nature, prior even to the statute of treasons, for we find the following remark, so early as the year 1228, *Judei pro consuetudine* to bring counterfeit money into the realm.

Knights' Hist. A. D. 1289. 2 Hen. V. c. 6. which statute hath not been remarked by modern writers, who date the penalty of treason for the offence of impairing the coin from Stat. 3 Eliz. 1. The Answer on the Rolls given by Henry the Fifth is, *Quant a le loture, tonsure, et filage, soit il declare pur treason.*

*netæ in magna multitudine ubique per Angliam  
suspenduntur.*

This, with other intermediate treasons, was repealed, and revived alternately, during a long course of years. At present, by the aid of many modern statutes, in which the accuracy and ingenuity of description seem to have engaged all the anxiety of the enactors, it forms a very considerable article in our laws, and frequently puzzles all the efforts of mercy to save the wretches, who become liable to its penalties.

It is now high-treason, to have in possession any instrument, or tool, "not of common use in any trade," but proper only for Coining. With almost equal propriety it might be called homicide to be in possession of a Pistol.

It is also high-treason, "to make, or mend, or have in possession, any instrument, or cutting-engine, for cutting round blanks by force of a screw, out of flatted bars of gold, silver, or other metal; I have copied the words of the

\* Thom. Walsingham, Hypodigm. Neust. p. 69.

7. 8 and 9 Will. III. c. 26.

statute. It may be proper to observe here, that there are also many offences, relative to the coin, in the nature of felonies and misdemeanors, and it is much to be regretted, that the several statutes on this subject are not all reduced into one act.

I shall only add, that, by the last act on this subject, "the alteration of a farthing with intention to make it pass for a sixpence, is high-treason in the offender, his aiders, and abettors."

The idea, of what Bodin affectedly calls, the harmonious proportion of punishments, should never be forgotten in acts of penal legislation. It is merciless and absurd, to impute the same guilt, and give the same chastisement, to the leader of a rebellion, and the diminisher of a piece of money.

This extravagant idea seems to have existed in the common law of England; and probably derived its origin from the law of the Romans. *Cudenda pecuniæ obnoxii Majestatis crimen admittunt, et omni dilatione remota Flammarum exustionibus mancipentur* : and

16 Geo. II. c. 24. 2. again,



-again. *Quicumque membra aurea partem  
inixerint, partim finxerint, partem raserint, si  
quidem liberi sunt, ad bestias dari; si servi,  
summo supplicio affici debent.* Such were  
the expressions of Theodosius and Justinian;  
but no early authority can justify the conse-  
quences of their import, which will be best  
described in the words of an eloquent and  
humane modern writer. This compounds  
the distinction and proportion of offences;  
and by affixing the same ideas of guilt  
upon the man who coins a leaden groat,  
and him who assassinates his sovereign,  
takes off from that horror, which ought to  
attend the very mention of the crime of  
high-treason, and makes it familiar to the  
subject.

In France also this crime is considered as a  
species of treason, and subjected to Capital  
punishment by an edict, A. D. 1726; it was  
formerly treated with greater mildness, as we  
learn by the following law promulgated by  
Childebert III, A. D. 744; *de falsa moneta  
jubemus, ut qui eam percussisse comprobatus fuerit,  
manus ei amputetur; et qui hoc consensit, si liber*

The

<sup>1</sup> Baluze, t. i. c. 20. p. 154.

*sexaginta solidos componat; si servus, sexaginta ictus accipiat.*

§ 6. The last kind of treason, declared in stat. 2 Edw. III. relates to the actual killing of certain magistrates in the execution of their offices. Reverence and security are certainly due to the dispensers of public justice; but it may be doubted, whether they are so immediately the representatives of sovereignty, as to make the crime of killing them, however aggravated in its nature, lose its proper name of murder.

§ 7. All the treasons created between this statute, and the first of Mary, were repealed in the commencement of her reign; together with all felonies and præmunires enacted under Henry the Eighth.

But the struggles and jealousies attending the first progress of the Reformation, introduced under Q. Elizabeth a new species of treasons; of which, after various alterations, many exceptionable instances are still existing.

The second offence of extolling the Pope's power is at this day treason<sup>i</sup>; upon which it is obvious to observe, that the idea of a treason, arising from a repetition of the offence, is in itself an absurdity. It is also treason, to obtain, or publish, or put in execution, within the British dominions, a Popish Bull of absolution, or reconciliation<sup>k</sup>; or to withdraw, *or be willingly withdrawn*, to the Popish religion; or to receive Popish orders; or to refuse a second tender of the oath. I have already observed, how repugnant it is to reason, religion, and humanity, to extend the infliction of death to the irresistible dictates of conscience, and belief.

§ 8. It will be sufficient to refer to our statute books for the particulars of another modern species of high-treason, the possibility of which seems soon likely to expire; and the necessity of which, as a civil sanction, is already sunk, in the united and affectionate attachment of the whole realm to the illustrious family of its present Sovereign. But the misdirected, and dangerous zeal of political enthusiasts, made it expedient, in the esta-

<sup>i</sup> 5 Eliz. stat. 2. Sav. 46.

<sup>k</sup> 13 Eliz. c. 2.



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blishment of the Protestant succession, to affix the highest civil guilt to every overt act, by writing, or otherwise, in opposition to that establishment; to every denial of the power of parliament to limit the succession; and to every mode of correspondence with the abdicated prince, or his children<sup>1</sup>.

To these wise severities of our ancestors we are in some degree indebted for the inheritance of those rights, of which we boast the present enjoyment. The imitation of their venerable example, in the unimpaired transmission of those rights to our posterity, is a duty, to which we are called by the united voice of civil and religious liberty.

§ 9. Having now, upon the principles of justice and necessity, examined the crime of high-treason, both as actually considered by the positive laws of different countries, and as it ought to have been considered by those laws; I shall endeavour to pursue the same method as to the degrees of punishment, which have been, and which ought to be, adapted to it.

<sup>1</sup> See 1 Ann. stat. 2. c. 17. and stat. 6 Ann. c. 7.

Here we have a melancholy instance, how much the recollection of humanity may be insensibly stifled in the warmth and resentments of self-love. The crime, being personally and immediately against law-givers and legislation, hath engaged the full exertion of ingenuity and power, to make its punishment as immoderate, and as complicated as possible.

It would be a painful task to describe the executions of Ravallac, and of Damiens; neither is it necessary to refer to the executive justice of foreign nations. I shall confine myself on this point to the practice of England, which cannot be stated better, than by an extract from the authoritative, and nervous description of Sir Edward Coke; who, with great profusion of learning, and a total want of common benevolence<sup>m</sup>, enters into the following discussion in the presence and hearing of seven unhappy men,

<sup>m</sup> Those, who are anxious to apologize for Sir E. Coke, will say, that the crime, of which those men stood accused, was perhaps the most horrid that ever entered into the heart of man: this apology might have some weight, if his harangue had been rather *after* conviction, than *before*.

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who were about to undergo this sentence full of horrors<sup>a</sup>.

“ These traitors have exceeded all others  
 “ their predecessors in mischief; yet his  
 “ majesty in his admirable clemency and  
 “ moderation will not invent any new tor-  
 “ tures or torments for them; but hath been  
 “ graciously pleased to afford them as well  
 “ an ordinary course of trial, as an ordinary  
 “ punishment much inferior to their offence.  
 “ And surely worthy of observation is the  
 “ treatment by law provided and appointed  
 “ for high-treason.

“ For first, the traitor shall be drawn to  
 “ the place of execution, as not being wor-  
 “ thy any more to tread upon the face of  
 “ the earth, whereof he was made; and with  
 “ his head declining downwards, and as  
 “ near the ground as may be, being thought  
 “ unfit to take the benefit of the common  
 “ air.

“ He shall next be hanged up by the neck  
 “ between heaven and earth, as deemed un-  
 “ worthy of both or either, as likewise that

<sup>a</sup> State Trials, vol. i. p. 235.



“ the eyes of men may behold, and their  
 “ hearts condemn him. Then is he to be  
 “ cut down alive, and to have his parts of  
 “ generation cut off, and burnt before his  
 “ face, as being unworthily begotten, and  
 “ unfit to leave any race after him. His  
 “ inlaid parts shall be also taken out, and  
 “ burnt; for it was his heart, which har-  
 “ boured such horrible treason. His head  
 “ shall be cut off, which imagined the mis-  
 “ chief; and lastly, his body shall be quar-  
 “ tered, and the quarters set up in some  
 “ high and eminent place, to the view  
 “ and detestation of men, and to become  
 “ a prey for the fowls of the air. And this  
 “ is the reward due to traitors; for it is the  
 “ physic of government, to let out corrupt  
 “ blood.”

It hath been affirmed both with respect to  
 nations and individuals, that the sentiments  
 of benevolence bear a general proportion to  
 the progress of science; but the name of Sir  
 Edward Coke will not be cited in support of  
 this observation. With great acuteness and  
 depth of learning, he retained through life a  
 hard, un pitying nature; that brutal insolence  
 which is so often produced in narrow minds,  
 by

by undeserved or unexpected prosperity, marked all his actions. His learning, indeed, was not of that kind which we call *literæ humaniores*; but it would be an inference, highly injurious to the profession, to suppose, that the practice of law blunts the sensibility of the mind.

As to the punishment inflicted by our law on high-treason, which occasioned this digression; it appears formerly to have been a part of the judgement<sup>o</sup>; that the convict should be drawn upon a hurdle; but an instance is recorded<sup>p</sup>, in which Shard, Justice, ordered, that nothing should be brought, whereupon he should be drawn, "*mes que sans cley, ou autre chose a desouth lui, soit tray de chivaux, hors de la sale, ou il avoit judgment, tanque a les furcs, &c.*" It was also a part of the ancient judgement<sup>q</sup>, "*que les peivies membres soient excises de son corps, et comburés deins son vieu*:" but this was omitted by Lord Hardwicke in the judge-

<sup>o</sup> Staunford, l. iii. c. 19. p. 182. It is remarkable, however, that before the time of Henry VII. there were hardly two judgements, of which the form was the same. See Carthew's Reports, p. 349. Walcot's case.

<sup>p</sup> Aff. xxxiii. 7. Hale's Hist. P. C. i. 382.

<sup>q</sup> Staunford, iii. 19.

ments passed upon the four Lords in the year 1746<sup>\*</sup>; and in a former case had been thought unnecessary<sup>\*</sup>. Still, however, the criminal must be ordered to be cut down alive. For upon a writ of error, to reverse an attainder in the 8th of W. III. it was assigned for error, that the court had only directed, *quod interiora sua extra ventrem suum capiantur, et in ignem ponantur*, omitting, *ipso vivente*, or, *in conspectu ejus*; and it was said by Lord Chief Justice Holt, that "though this omission be for the benefit of the party attainted, yet still it is error; for the judgment in all capital cases is stated and settled by the common law, which no court can alter." The attainder was thereupon reversed, and the reversal was affirmed in parliament<sup>\*</sup>.

It is certain, that the crime of high-treason is often of such a tendency, as to require the *ultimum supplicium*, or, in other words, the extirpation of the criminal.

But when we are constrained to have recourse to that fatal extremity, it should always

<sup>\*</sup> State Trials, vol. ix.

<sup>\*</sup> Lord Raymon, p. 1.

<sup>\*</sup> Walcot's case, 12 Mod. 95, 96.

<sup>\*</sup> Mich. 11 W. III. Shower's Parli. Cases, p. 177.



be observed, that whatever exceeds simple death is mere cruelty. Every step beyond is a trace of ancient barbarity, tending only to distract the attention of the spectators, and to lessen the solemnity of the example. There is no such thing as vindictive justice; the idea is shocking. Public utility is the measure of human punishments; and that utility is proportionate to the efficacy of the example. But whenever the horror of the crime is lost in sympathy with the superfluous sufferings of the criminal, the example loses its efficacy, and the law its reverence.

A nation, familiarized and reconciled to the execution of the English sentence in cases of high-treason, would probably consist of a pusillanimous and despicable people; cruelty and cowardice are inseparable.

CHAP. XV.

*A Digression relative to the English Trials in Cases of High-Treason.*

§ 1. I Ought not to dismiss this subject, without remarking a very pleasing part of English law relative to high-treason;

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as founded in humanity, animated by the spirit of freedom, and perfected by all the powers of limited wisdom.

From the affectionate temper of the nation, great warmth hath been shown against the crime of disloyalty, both in the liberality of its construction, and in the severity of its punishment; but the whole attention of the legislature hath at the same time been exerted, to obviate all possibility of oppression in the prosecution, and all defect of certainty in the proof. Infinitely various have been the amendments, refinements, and alterations to this purpose; and upon the whole, the following cautionary provisions have been thought sufficient, and are at this day in force.

No person shall be prosecuted for high treason, except on a charge of assassination, designed or attempted on the body of the King, unless he be indicted thereof within three years after the offence committed. It had been observed by Sir Ed. Coke, near a century before this provision took place, that there wanted nothing to the perfect

7 W. III. c. 3. § 6.

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tion of the statute of the 25th Ed. III. but a limitation of some certain time, wherein the offender should be accused," And such had been the idea of Bracton: "*Post intervallum temporis accusator non erit audiendus, nisi docere possit, se fuisse justis rationibus impeditum*."

Non shall any person be indicted, except upon the testimony of two lawful witnesses, either both to the same overt act, or the one of them to one, and the other to another overt act of the same treason.

And now, since the decease of the late pretender, a copy of the indictment, with a list of the witnesses to be produced at the trial, and of the jurors impanelled, with the professions, and places of abode of the said witnesses, and jurors, shall be delivered to the person indicted, ten days before the trial; and it seems, that this would be construed exclusively of the day of delivery, and the day of arraignment.

<sup>3</sup> Inst. c. 20. Bracton, l. iii. fol. 118. b.  
<sup>4</sup> 7 W. III. c. 3. § 2. which clause is founded on  
 1 Edw. VI. and 5 Edw. VI. And 1, 2, Phil. & M.  
<sup>5</sup> 7 Ann. c. 22. and 20 Geo. II. c. 30.

Further,



Further, the same process is given to compel persons to appear for the person accused, as is used to compel them to appear against him; and lastly, they shall be upon oath, which was not the usage heretofore.

I should have observed, that these privileges except the last, are not extended to certain offences concerning the papal supremacy; nor to those against the coin; nor indeed to any treason, wherein the corruption of blood is saved by statute.

The jurors must, by the common law, be of the same county wherein the offence was committed. When the trial comes on, the prisoner is allowed to object peremptorily to thirty-five, on mere caprice, prejudice, or private knowledge of their characters or prepossessions; and to any indefinite number, upon the assignment of a legal objection to each.

In this, and in the whole course of the prosecution, he shall also be allowed to make his defence, as well in points of fact, as in legal questions, by Counsel learned in the law, not exceeding two in number, to be named by himself, and assigned by the court; and his Counsel

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Counsel shall have free access to him at all reasonable hours; nor shall he be obliged to appear for or against them to appear against them.

The trials of Sir William Friend, Sir William Parkyns, and others, on the assassination plot, came on after this provision had received the royal assent, but before the commencement of its operation. I shall intreat, said the last of these gentlemen, so that I may have the allowance of Counsel; I have no skill in indictments; I do not understand these

matters, nor what advantages may be proper for me to take. The new statute wants but one day. What is just and reasonable to-morrow, surely is just and reasonable to-day; and your Lordship may indulge me in this case.

Holt, Chief Justice, was too good a judge to suffer the stubborn principles of law to yield to the milder inferences of equity. We

cannot (he replied) alter the law, till law-

But this did not extend to any prosecution by impeachment till stat. 20 Geo. II. c. 30. which allowed Counsel in that case also. And with great reason (saith Mr. J. Foster) since the Defendant is struggling under the whole weight of the Commons of Great-Britain.

State Trials, and signed by the makers

*“ makers direct us ; we must conform to the law,  
 “ as it is at present, not what it will be to-  
 “ morrow ; we are upon our oaths so to do.”*

It is remarkable, that this indulgence is not yet allowed, except in points of mere legal disquisition, in any other capital crime ; a deficiency, which hath given rise to the very benevolent adage, “ That the judge shall always be counsel for the prisoner.” And indeed, the probity of the English judges, assisted by their experience and humanity, would generally afford ample security to persons accused, if counsel had not full permission to be employed against them. This permission, in good times, was never exerted without great discretion and tenderness ; still however it was not always ineffective in its consequences. But surely it is contradictory to the first principles of justice, that a prisoner, labouring under the weight of a capital charge ; weakened by long confinement, distracted by apprehensions though perhaps innocent, distressed by the tears of his family, checked by conscious ignorance, and disconcerted by the awful novelty of his situation ; that, in such a state of mind, a prisoner should be singly exposed to the united, and unrestrained prosecution



tion of learned men; habituated to public speaking, and (in the words of a very ancient author) "skilled in the arts of forwarding, "and defending a cause by the rules of law, "and customs of the realm." The judge may be anxious to expose, and refute the prevarication of the witnesses; but he is ignorant of the minute circumstances of the fact in question; he knows not the characters of the men, and cannot stop the trial to receive private instructions from the prisoner. The jurors are honest, and inclinable to mercy; his equals; and his neighbours; chosen in some measure by himself, and superior to all suspicion: but perhaps they are illiterate; at all events they are men; and therefore liable to be hurried away by the eloquence and abilities of advocates.

Both the Romans<sup>d</sup>, and Athenians, appear to have give full scope to the exertion of

\* Gents, ne sachent, my comunement, tous les exceptions, que valent en response; font countours necessaires, que sachent les barres avancer et defendre; per les Rules del Lex, & les usages del Realm.

Myrror, c. 3. de Exceptions.

Non solum autem dicendo, sed etiam faciendo quadam, lacrymas movemus, et producere ipsos, qui periclitantur, squalidos atque deformes, et liberos eorum ac parentes, institutum;

toratory in criminal cases, both for and against the defendant. Among the Athenians indeed there was a law of Solon's, forbidding advocates to use either *ekordia* or *perorationes*; or to circumvent the passions of the judges by artifices, either of commiseration or amplification. Yet we are told by Cicero, that, when Demosthenes was expected to plead, the fame of his eloquence brought a general concourse of strangers to Athens from the most remote parts of Greece, as to the most celebrated spectacle in the world; and those of his orations, which have reached our time, are undoubtedly powerful examples of that pathetic and personifying species of eloquence, which is calculated to intoxicate the imagination of an audience, and communicate the successive emotions of anger, indignation, and pity. There is a very remarkable anecdote recorded by Athenæus, relative to the trial of Phryne, the Athenian Courtesan. She was the same, from whom Apelles drew his picture of Venus rising from the sea. *institutum; & ab accusatoribus ostendi cruentum gladium, et vulneribus ossa, et vestes sanguine perfusus videmus, et vulnera resolvimus, ac verberata corpora nudamus, quarum rerum ingens plerumque vis est, velut in rem præsentem animos hominum ducentium. Et populum Romanum egit in forum prætexta Cæsar prælata in foro cruenta."* Quintil. vi. 1.

Athenæus, l. xiii.

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the waves, and who served also as a model for the famous statue of Praxiteles; two circumstances, not immaterial in support of the following fact. "*Phrynæ cum in capitali noxa patrocinaretur Hyprides, et jam manifestum esset calculis judicium condemnatum iri; in apertum eam produxit, et discissis tuniculis, pectoreque nudato, postremâ orationis parte, illius conspectâ pulchritudine, ita peroravit, ut, tanquam ministram sacerdotemque Veneris, judices religione tacti, at misericordiâ commoti, necandam minime censuerunt.*" To this sudden sensibility of the Areopagites, one may fairly apply Quintilian's observation, "*quod harum rerum ingens plerumque vis est, velut in rem præsentem animos hominum ducentium.*"

It is a consequence of that wisdom which characterizes the English, as a people, in the whole system and administration of their Laws, that all the artifices of speech are banished from the Bar. The passions ought not to be addressed in appeals to the reason. The unsubstantial harmony of declamation may be well adapted to the ears of an arbitrary tribunal: but the decisions of English Judges are founded on the argumentative in-  
ferences



ferences of strict statutes, and recorded precedents. Our courts have furnished proofs indeed, that the strains of ancient eloquence are neither inimitable, nor unattainable; but a nobler and more proper theatre hath been found for the exertion of that talent. Plain sense, delivered in accurate expression, with a warm and graceful articulation, is the true eloquence of law.

But to return to my inquiry, how far Counsel ought to be admitted, either for, or against the defendant, in criminal prosecutions. Upon the whole, perhaps it might be the best medium, in all cases, to confine the discussion of the fact to the artless unguided tale of the witnesses; with a full permission to Counsel, on both sides indifferently, to suggest, support, or refute questions, or objections of law, and to undertake the management at large, when the issue turns not upon the general question of "Guilty" or "Not Guilty," but upon collateral facts. It

In which case, from instances so early as the first year of Hen. VII. the defendant appears to have been always entitled to the full assistance of Counsel, and indeed without such assistance it would be impossible for him to know either when to hazard his defence upon collateral allegations, or how properly to enforce those allegations. See Foster, 232. Sira. 824.

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might be proper at the same time to declare, how far trivial mistakes, in matters of mere form, should continue fatal to the whole process; and whether any exceptions of counsel should be heard or allowed; but what tend in some degree to affect the merits of the case.

§ 2. The admissibility and sufficiency of evidence in trials for high-treason is also subjected to very peculiar limitations.

No evidence can be received of any overt act, not charged in the indictment; except, as in support only of one which is charged. Two witnesses are requisite to the conviction, in the same manner as to the indictment; and they shall, in giving their evidence, be confronted with the person accused, which is now indeed the practice in all cases. If two distinct treasons be charged, one witness to each shall not be two within the meaning of the statute; but one witness is sufficient to prove any fact, on which the criminality of the charge is ultimately and not immediately founded; I shall cite an instance<sup>a</sup>.

<sup>a</sup> Hale's Hist. P. C. ii. 193. Mr. Emlyn's note.

<sup>b</sup> State Trials, vol. v. p. 38

When, in the trial of Captain Vaughan for adhering to the King's enemies, it was necessary in the outset to prove him a subject of England; it was objected by his counsel, that one witness only had been called for that purpose; and the objection was overruled by Holt, Chief Justice, "for that is "no overt act; if there be one witness to "prove that, it is sufficient." In like manner, writing, being a deliberate act, certainly may<sup>1</sup> under some circumstances *with publication* be an overt act of treason; and when so laid in the indictment, must be proved by the testimony of two witnesses. But the testimony of one is competent to prove writings, offered only as collateral evidence; and such papers, though not of the hand-writing of the prisoner, may be read as evidence, if found in his custody<sup>2</sup>; and papers under certain descriptions may be in the legal custody of a person, though not actually found upon him<sup>3</sup>.

*"Unius responsio testis omnino non audiatur,"* were the words of the Civil Law, which did not allow the testimony of one witness

<sup>1</sup> Foster 108. case of Laver, State Trials, vol. vi. p. 321.

<sup>2</sup> State Trials, vol. vi. p. 281.

<sup>3</sup> Lord Preston's case, State Trials, vol. iv. p. 431.



to be conclusive in any case<sup>m</sup>. And Baron Montesquieu seems to have adopted this idea in its fullest latitude. "*Les Loix* (says he) *qui font périr un homme sur la déposition d'un seul témoin, sont fatales à la liberté. La raison en exige deux; parce qu'un témoin qui affirme, et un accusé qui nie, font un partage; et il faut un tiers pour le vuider. Les Grecs et les Romains exigeoient une voix de plus pour condamner. Nos loix Françoises en demandent deux. Les Grecs prétendoient que leur usage avoit été établi par les Dieux; mais c'est le nôtre*".

It may be doubted, whether the plea of the prisoner, which is dictated by the sentiment of self-preservation<sup>o</sup>, can with any propriety be said to counterbalance the solemn oath of his disinterested accuser. Yet such were the sentiments of the president Montef-

<sup>m</sup> Cod. iv. 20. 9. "*Vox unius vox nullius est.*" Harmonius, li. c. 6. See the Commentaries on the Law of England, B. iv. 351.

<sup>a</sup> L'Esprit des Loix, l. xii. c. 3.

<sup>o</sup> It is not unusual, even at this day, upon the Continent, to administer an oath to the supposed criminal, in order to extort the truth from him; reducing him (says the Marquis Beccaria) to this terrible alternative, either of offending God, or of contributing to his own immediate destruction; and leaving him only the choice of becoming a bad Christian or a Martyr.

quieu, and such hath been the usage of many great and learned nations. The law of England hath seen reason to reject an idea, which, if strictly adhered to, would give the privilege of impunity to every crime, however flagrant in its nature, if committed in the presence of one person only. Except therefore in cases of treason, in which the principles of our constitution demand peculiar strictness of proof, one witness, if credited, is with us sufficient to establish the conviction of any capital crime, and indeed of any offence whatever. I ought perhaps to except also the case of perjury, in which, a single unsupported witness would be adjudged insufficient; for the oath of the accuser being placed in opposition to the oath of the accused, truth remains suspended. In such a situation, the scale of innocence should be presumed to preponderate.

The nature of my design will not permit me to extend this digression upon criminal process in cases of treason, to an enquiry into the general principles of evidence. It is however a field still open to investigation: for the considerations of some very ingenious writers on this subject, have been too much influenced

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influenced by their acquiescence in practical authority; and we are furnished, rather with useful and sensible histories of what the law of evidence actually is, than with any free and speculative disquisition of what it ought to be.

§ 3. By statute 7 W. III. c. 3. the above-mentioned requisites towards conviction can only be supplied by "the confession of the party, made in open court, willingly and without violence."

The words "in open court" were not inserted in the statute of Edward VI, which contained the rest of this proviso; and confessions, taken out of court upon the examination of the party, had been holden sufficient <sup>p</sup>. But now, it should seem, that such confessions, though proved by two witnesses, cannot in any case operate to conviction; and that there must still be two witnesses to the treasonable fact.

But another doubt hath arisen, how far such confessions can be admissible, even as

<sup>p</sup> Case of Tonge. Hale's Hist. P. C. i. 304. Kel. 18. Andersen, ii. 67.



collateral evidence; and it seems to be the better opinion<sup>9</sup>, "that a confession out of court may be proper to be submitted to the jury, in corroboration of the other evidence of the overt acts," only "when made during the solemnity of an examination before a Magistrate, or person having authority to take it; when the party may be presumed to be properly on his guard, and apprized of his danger." However, a greater and more exceptionable latitude of construction, on this subject, appears in some instances<sup>\*</sup> to have been admitted.

The

<sup>9</sup> Foster, p. 242, 243.

\* At a meeting of the Judges in January, 1707, to consider some matters relative to the intended trial of Gregg for treason; Holt, Ch. Justice, Powel, Powis, and Dormer, Justices, Smith, and Bury, Barons, were all clearly of opinion, "that the prisoner's confession, though not in court, might, if proved by two witnesses to have been voluntarily made, notwithstanding what is contained in the 7 W. III. c. 3, §. 2. be read as evidence against him. But Trevor, Chief Justice, was of a contrary opinion, and Tracy, Justice, doubted." I should observe, that this case is not in any reporter, but copied from Bacon's Abridgement, vol. v. p. 146.

The two learned Judges, who dissented, had no doubts on a future occasion, as to the admissibility of confessions on matters merely collateral; and in this distinction they seem to have proceeded on very solid grounds. For, in the case of Smith, who was indicted in June, 1709, for adhering to the Queen's enemies, "Alienage was the defence;

and

The confession of a criminal, when taken even before a magistrate, can rarely be turned against him, without obviating the end for which he must be supposed to have made it. Besides, we have known instances of murders avowed, which never were committed; of things confessed to have been stolen, which never had quitted the possession of the owner.

It is both ungenerous therefore, and unjust, to suffer the distractions of fear, or the misdirected hopes of mercy, to preclude that negative evidence of disproof, which may possibly, on recollection, be in the power of the party; *we should never admit, when it may be avoided, even the possibility of driving the innocent to destruction.* Nothing was more common in the beginning of the last century than confessions of witchcraft. Sir James Melville

and his confession that he was an Englishman born, was allowed to be admissible Evidence, by Trevor, Powel, Powis, Tracy, and Bury, though his counsel insisted on the act of the 7<sup>th</sup> of King William." Foster's Rep. 243.

It is said, however, that Evidence of confession was, without any such distinction, holden sufficient by the Judges who sat upon the commission in the North in 1746. But the instances are not, I believe, in print; and "it is dangerous (saith Sir Edward Coke) to report a case by the ear, especially concerning treason."

mentions several instances in their prosecution of Earl Bothwell; and, though, rather a sceptical man, was candid enough to believe them. The poor women were accordingly burnt; and posterity was furnished with a very accurate description of the devil; who is said to have appeared "in a black gown, with a black hat on his head, in the attitude of preaching, and with posteriors as cold as steel."

The evidence of words, alleged to have been spoken by the person accused, and connected with the criminality of the charge, ought also to be received with great distrust. Such words are either spoken in the zeal of unsuspicious confidence, and cannot be repeated without a breach of private faith, which detracts much from the credibility of the witness; or in the unguarded hours of boasting dissipation, in which case they are not unlikely to be false in themselves, and very likely to be falsely repeated. Besides, words may be very innocent when spoken, and highly criminal when related; for their determinate signification depends much on the

context in which they are used. In the following instance, because it is connected with the



tion in which they are uttered. "It often happens, too, that, in repeating the same words, a different meaning is conveyed, which depends on their connection with other things; and sometimes more is signified by silence, than by any expression whatever."

§ 40 Such are the principal rules, limitations, and restrictions, to which the English prosecutions of high treason are subjected in every stage of the process.

Lastly, the positive testimony of a thousand witnesses to the positive allegation of the indictment is not conclusive, in any case, as to the verdict of the jurors. But they will still retain an indisputable, unquestionable right to acquit the person accused, if, in

*L'Esprit des Loix*, l. xii. c. 12.

"In the Case of *R. H. T. Coron. Fitz. H. 1008.*

"upon Acquittal of a common thief, the Judge said, the Jurors ought to be bound to their good behaviour during their lives; but, saith the book, *quere per quel Ley?*

"But that was only *gravis dictum* by the Judge, for no such thing was done." *Vaughan's Reports*.

It must be confessed, that in later times the Judges, in their disagreements with Jurors, did not confine themselves to threats; and it would be uncandid to suppress the following instance, because it is connected with the matter in question.

Kelyng's

in their private opinions, they disbelieve the accusers; or if, in their consciences, they think, however erroneously, that the fact partakes not of that degree, or species of criminality, with which it is charged in the indictment. They may, if they find doubts or difficulties in the case, require the direction of the court; but whether they be in any case *compellable*, either to have recourse to that direction, or to submit to it when voluntarily given, are questions, on which a very important diversity of opinion hath appeared in the minds of great and good men.

“It is the privilege of Englishmen, say those who support the negative, to be tried

Kelyng's Rep. 50. “Memorandum, Lent Circuit, Winchester, 18 C. 11. one Henry Hood was indicted for the murder of J. Newen, and upon the evidence it appeared, that he killed him without any provocation. And thereupon I directed the Jury that it was murder; for the law in that case intended malice; and I told them they were judges of the matter of fact, viz. whether Newen died by the hand of Hood: *But whether it was murder, or manslaughter, that was matter of law, in which they were to observe the direction of the Court.* But notwithstanding they would find it only manslaughter. Whereupon I took the verdict, and fined the jury 5 l. apiece, and committed them to jail, till they found sureties to appear at the next assizes, and in the mean time to be of the good behaviour. But after, upon their petition, I lowered their fines to 40s. apiece, which they all paid, and entered into recognizances.

by

by their equals; and that privilege will become *vox et præterea nihil*, whenever it ceases to be the duty of those equals, to infer and conclude their verdict from the testimony of witnesses, by the act and force of their own understanding.

Would it not, they continue, be a most preposterous doctrine, that they, who, under the obligation of a solemn oath, are chosen to try a fellow citizen for a crime, and as a criminal, and bounden by that oath to give a true verdict between the public and the prisoner according to the evidence; that, in this predicament, they should be told, that the criminality or innocence of the intention, the legality or illegality of the fact, are matters of indifference, not subjected to their enquiry; and that their verdict ought not to be influenced by any such considerations?

“To what end (said Lord Chief Justice Vaughan) are the Jurors challenged so scrupulously to the array and poll? to what end must they have such a certain freehold, and be *probi et legales homines*, and not of affinity with the parties concerned? to what end must they have in many



"many cases the view, for their exacter in-  
 "formation chiefly, to what end must  
 "they undergo the heavy punishment of the  
 "villainous judgement? if, after all this,  
 "they implicitly must give a verdict by the  
 "dictates and authority of another man,  
 "when sworn to do it according to the best  
 "of their own knowledge? *A man cannot see*  
 "*by another's eye, nor hear by another's ear;*  
 "*no more can a man conclude, or infer the thing*  
 "*to be resolved by another's understanding or rea-*  
 "*soning;* and though the verdict be right, which  
 "the jury give, yet they, being not assured  
 "it is so from their own understanding, are  
 "forsworn, at least in *foro conscientia*. That  
 "*decantatum* in our books, *ad questionem facti*  
 "*non respondent iudices, ad questionem legis non*  
 "*respondent juratores*, literally taken, is true;  
 "for if it be demanded, what is the fact? the  
 "Judge cannot answer it; if it be asked,  
 "what is the law in the case? the Jury can-  
 "not answer it. But upon all general issues,  
 "though it be a matter of law, whether the  
 "defendant be a trespassor, a debtor, disseisor,  
 "or disturber, in the particular cases in issue;  
 "yet the jury find not, as in a special ver-  
 "dict, the fact of every case by itself, leaving  
 "the law to the court: but find for the  
 "plaintiff

"plaintiff or defendant upon the issue to be  
 "tried, wherein they resolve both law and  
 "fact complicately, and not the fact by itself:  
 "so as though they answer not singly to the  
 "question, what is the law; yet they deter-  
 "mine the law in all matters, where issue is  
 "joined and tried in the principal case, except  
 "when the verdict is special."

"Special verdicts," say the Commentaries  
 "on the Law of England," arise, when the  
 "jurors doubt the matter of law, and there-  
 "fore chuse to leave it to the determination  
 "of the court."

And it is (saith Sir Matthew Hale) the  
 "conscience of the jury, that must pronounce  
 "the prisoner guilty, or not guilty; for to  
 "say the truth, it were the most unhappy  
 "case, that could be, to the judge, if he, at  
 "his peril, must take upon him the guilt or  
 "innocence of the prisoner, unhappy also  
 "for the prisoner: for, if the judge's opinion  
 "must rule the verdict, the trial by jury  
 "would be useless."

Vaughan's Reports, p. 148-151.

Commentaries, B. iv. p. 354.

Hale's Hist. P. C. ii. 313.

But the law to the court, but for the  
 "plaintiff."

But a contrary opinion hath been given by a learned and worthy Judge in very decisive language. "In every case (saith Mr. Justice Foster, p. 255) where the point turneth upon the question, whether the homicide was committed, willfully and maliciously, or under circumstances justifying, excusing, or alleviating the matter of fact, viz. whether the facts alledged by way of justification, excuse, or alleviation be true; is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgement of the court." Again, p. 256, "When the law maketh use of the term, *malice aforethought*, as descriptive of the crime of murder, it meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit." And, p. 257, "the *malus animus*, which is to be collected from all circum-

It is an obvious remark on these passages, that the learned writer hath rested his position on the mere authority of an assertion, unsupported by argument or reference; and, in a subsequent chapter, I shall have occasion to cite another passage from the same work, but of a very contradictory import.

"stances,



“stances, and of which, as I before said, the  
 “court, and not the jury”, is to judge, is what  
 “bringeth the offence within the denomina-  
 “tion of wilful malicious murder, whatever  
 “might be the immediate motive to it, whe-  
 “ther it be done as the old writers express  
 “themselves, *ira*, *vel odio*, *vel causa lucri*, or  
 “from any other wicked or mischievous in-  
 “centive.”

When wise and good men differ upon points of great constitutional importance; it is the duty of their humbler fellow citizens, to

“In the trial of Coke and Woodburne for disfiguring Mr. Crispe, it was much urged by the former, that his intent to kill and not to maim, was a point of law, proper only for the decision of the court. But the Lord chief justice King, after stating the Evidence, thus addressed the jury.

“Now, gentlemen, what the intent of these persons was, in slitting Mr. Crispe’s nose, you are to try; this is “a matter of fact for your consideration and determination: it is the same in other felonies, where the intent of the party makes the crime. Burglary is breaking “open an house in the night-time, with an intent to “commit a felony; though no felony be committed, yet “if there were an intent to do it, it is burglary. So in “the case of larceny, the intent, with which another “man’s goods have been taken away, is a matter of fact “to be enquired into and determined by the jury. So “that in this case you are to try no other matter than what “is tried in other felonies, viz. the intent of the parties.”

State Trials, vol. vi. p. 222.

wait

wait the result of that dispassionate and candid difference, with a silent prayer, *ne quid detrimenti capiat respublica.* To which however this may be added as a certain truth, that the political liberty of every individual bears a proportion to the security given by the laws to the innocency of his conduct; which security decreases, in proportion to the multiplication of penalties, the uncertainty of penal laws, and the irregularity of trials.

## C. H. A. P. XVI.

*A further Digression relative to the gradual Improvements of criminal Process.*

§ I. **I**N the sixth century, Clotarius, King of France, made a law, that nobody should be condemned to death without a hearing<sup>b</sup>. Prohibitory laws may generally be presumed to have a retrospect to a contrary usage; it seems strange therefore, that this, which I have mentioned, should have been

*L'Esprit des Loix; l. xii. c. 12.*

necessary

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necessary in support of the most obvious principle of justice. But the efforts of human wisdom are slow in their progress, and limited in their extent; political systems therefore are, in all instances, though in different degrees, imperfect, and consequently best understood by comparison.

In this point of view, a short state of criminal process by the common law of England will form a striking illustration of the foregoing chapter, and may have a more essential effect; for it will be found, that in prosecutions of felony, and in other particulars, we still retain some vestiges of that oppressive barbarism which I am about to describe.

I speak not of those proceedings, which were founded in the gross superstitions of our fore-fathers; such as the presumptuous purgation of ordeal, either by fire or by water;

We find in the Welsh laws a third species of ordeal, unknown probably in all other countries. *Femina, quæ cum aliquo clandestino abierit, et vel in agro, vel in domo stuprum passa sit, et ab illo postea repudiata fuerit, et querelam contra illum instituerit, apud gentiles suos et in curia, hoc modo depabitur. Si tauri trami candulam detonsam, et sebo inundatam, per januam vimineam immissam, mulier intra domum, pedibus limini innixit, manibus prehensum, desinere potuerit,*



in which it was impossible for innocence to escape, without a miracle from Heaven: nor yet of that more unchristian, impious mode of trial by battle; which, when the defendant was innocent, often ended in his murder; and when guilty, in his triumphal acquittal, with the additional stain of the appellant's blood upon his head. My observations shall be confined to the boasted, and venerable institution of trial by jury, its preparatory process, conduct, and consequences.

§ 2. The ancient *Jusficiarii* in *itiner* made their circuit round the kingdom, for the purpose of trying causes and criminals, only once in seven years; in which interval, by the common calculation of lives, it is probable, that, exclusive of the distressed, and consequent depopulation of families, one half of the wretches under suspicion, and in custody, died in the dungeon. At all events, the crime had generally escaped the memory of mankind, before the execution of the crimi-

*tuerit, licet taurus a duobus hominibus utrinque stimulis urgetur; pro suo habebit in compensationem, ob infamiam violatae publicae. In aliter; habebit tantum sibi, quantum manibus addiderit.* Leges Wallice, fol. p. 82.

*Disertatio de judicis Dei. Antiquit. Italic. vol. III. p. 612.* nal.

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But this was remedied so early as A. D. 1285, by stat. 13 Ed. I. c. 38, whence the present Justices of assize and Nisi prius are derived; an institution, which bears some resemblance to one of the customs ascribed by Tacitus to the ancient Germans *eliguntur in eisdem conciliis et principes qui iura per pagos vicisque reddunt. Centeni singulis ex plebe committes, consilium simul et auctoritas adfunt.*

§ 3. The temporary release of the prisoner, previous to the trial, when the criminal charge was apparently unjust, or ill founded; or when the crime was of so inferior a nature, as to admit his enlargement on pledges for his future appearance, seems, in the earliest periods of our constitution, to have been a matter of right; but the courtly pliability of some judges had involved this doctrine in very oppressive difficulties. These were at length happily, and totally removed; in A. D. 1771.

\* Tacit. de Mor. Germ. c. 12.  
 \* Stat. 31 C. II. c. 2. "This act was carried by an odd artifice in the House of Lords; Lord Grey and Lord Norris were named to be the Tellers; Lord Norris, being a man subject to vapours, was not at all times attentive to what was passing; so a very fat Lord coming in, Lord Grey counted him for ten, as a jest at first, but  
 "seeing

C. II. whose reign, though in its consequences happy to this kingdom, was a strange medley of liberty and tyranny, honour and profligacy, religion and impiety, beneficence and bloodshed.

In every stage both of civil and criminal suits, the laws, like the prayers, were administered in an unknown language; and this continued, as to matters of record, indictments, pleas, verdicts, judgements, &c. until the stat. 12 Geo. H. c. 26. They were also written in a strange hand with technical abbreviations. In this there was real danger; for though the indictment was always read to the prisoner in English; yet if there were any objections, recourse was had to the Latin original to support its insufficiencies; *contra formam statuti in hujusm. cas. edit. et provis.* (says Lord Hale) shall be construed either singularly or plurally. We cannot wonder then at the recital of the above-mentioned statute, that many and great mischiefs do frequently

“ seeing that Lord Norris had not observed it, he went on with this misreckoning of ten, and by the means the Bill passed, though the majority was indeed on the other side.” Bishop Burnet, vol. ii. 8vo. p. 131. H. 1.

“ Commentaries, B. iv. 412.

“ G. H. c. 26.

“ accrue



accrue to the subjects of the kingdom, from the proceedings in courts of justice being in an unknown language, those who are impleaded having no knowledge or understanding of what is alleged for or against them, in the pleadings of their lawyers and attorneys, who use a character not legible to any but persons practising the law." But we may reasonably wonder, that the remedy was deferred to the eighteenth century.

The christian name, and surname of the defendant, with his addition of state and degree, were first required to be set forth in the indictment, by an act of Henry the Fifth. One may infer, that, previous to this act, there was a great want of precision, in the formal parts of process; but the inclination of succeeding Judges, in favour of life, hath carried this matter to the opposite extreme of scrupulous, and over-grown nicety. Numberless are the instances, in which the substance of justice hath been lost in the pursuit of the shadow of mercy.

The

<sup>1</sup> 1 H. V. c. 5.

<sup>2</sup> For instance, *murdredavit*, for *murdravit*; *feloniter* for *felonice*, have been adjudged to vitiate the indictment;

The discontinuance of Latin indictments hath rendered such instances less common; but there is still sufficient reason to apply the observation of Sir Matthew Hale: "for the truth is, that it is grown to be a blemish, and inconvenience in the law, and the administration thereof; more offenders escaping by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offences, go unpunished by these unseemly niceties, to the reproach of the

*burglariter* for *burglariter* hath been a fatal objection, but *burglariter* hath been holden good. Yet these exceptions were allowed on the idea of uncertainty, not from an inclination to classical accuracy; for *presata regina* did not vitiate.

31 Eliz. J. Webster was indicted for murder, and the strong being laid, *sinistra brachia* instead of *brachia*, he was dismissed. In Leke's case, 24 Eliz., "A. B. alius dictus A. C. butcher" was deemed insufficient; it ought to have been "A. B. butcher, alias dictus A. C. butcher." An indictment of poisoning, wherein it is alleged, that J. S. *fidem adhibens* to the prisoner, *et nesciens potum prædictum cum veneno fore intoxicatum, accepit et bibit*, without saying *venenum prædictum*, is not good, and shall not be supplied by the implication of other parts of the indictment. So *gladium in dextrâ sua*, without "manu," &c. 5 Co. Rep. 121. Dyer 46. 4 Co. Rep. 39.

Hale's Hist. P. C. 288. Foster, v. Rogers. Hale's Hist. P. C. 100. "law,"

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"law, to the shame of government, to the encouragement of villainy, and to the dishonour of God!"

§ 5. At the common law<sup>a</sup>, no prisoner, in capital cases, was entitled to a copy of the indictment, pannel, or any other of the proceedings. It was refused to Sir Harry Vane, and Colonel Sidney. It was again much urged in the trial of Lord Preston, A. D. 1690, who desired to have it argued by counsel; which the court unanimously refused, "it being a point, that would not bear a debate."

§ 6. It appears to have been a common practice so late<sup>a</sup> as the reign of Charles II. for the Judges in their circuits to impose arbitrary fines on Grand Juries for supposed concealments and non-presentments; a dangerous exertion of power, tending to the encouragement of ill-founded accusations, and not warrantable by law!

§ 7. There were several means at common law of bringing felons to trial, without

<sup>a</sup> Hale's Hist. P. C. ii. 124.

<sup>m</sup> Foster, p. 228. State Trials, vol. iv. p. 411.

<sup>n</sup> Vaughan's Rep. p. 153. Hale's H. P. C. ii. 160.



any previous indictment: such as upon the *Mainpoyre*, when the thief was detected with the thing stolen *in manu*, and upon *appeals*.

The latter mode, of *appeals*, is still subsisting; and, though considered as odious by some, doth not appear in any instance to have occasioned injustice. Perhaps it ought to be regarded as an old branch of the law, which by possibility may become an essential safeguard to the rights of the people. It must however be admitted to have arisen from that ancient barbarous principle of legislation, which exacted the punishment of the criminal merely as civil damages to the party injured; and accordingly I find, that in the ancient *Salic laws* murder was punished with death, and no composition admitted, unless with the consent of the nearest friend of the deceased. From a similar reasoning it continues at this day the law of Saxony, that, if a thief suffer death, his heir is not compellable to restore the stolen goods<sup>p</sup>.

<sup>p</sup> Kaims, *Hist. Law Tracts*, p. 40. See also Robert-  
son's *Hist. of Charles the Fifth*, vol. i.

<sup>p</sup> Carpzovius, *iv*, 32, 33. The

The conviction or acquittal upon an indictment of murder or manslaughter, was at common law a good plea in bar to the appeal; but this privilege tended only to prolong the imprisonment and procrastinate the delivery of persons accused; for, before the statute 3 Hen. VII. the court was obliged by law not to proceed upon any indictment of murder within the year and a day; and it was usual in other cases to allow a similar interval; because of the interest of the appellant, who, being thought entitled *ex debito iustitiæ* to the gratification of his revenge, might in an appeal of death have execution upon the judgement notwithstanding any pardon; and who, in case, of robbery ought to have restitution, which upon an indictment before statute 21 H. VIII. he could not have.

Appeals in parliament by private persons, which, especially in matters of treason, were in frequent use, were abolished by statute 1 H. IV.

\* See the case of *Armstrong v. Lisle*, reported by Lord Chief Justice Holt, (Kelyng. p. 96,) which contains much information on this subject.

3 Inst. 31. 132. 1 Mod. 148. All petitions against great persons, and the prince's officers, were heard before the *barones majores*. And this court became a place of original jurisdiction for impeachments, which were preferred

H. IV. c. 14. "for the many great inconveniences and mischiefs, which had often happened thereby." A custom of this kind is observed by Tacitus, to have prevailed among the Germans; "*licet apud concilium accusare quemque, et discrimen capitis intinere.*"

§ 8. I now proceed to the arraignment of the Prisoner; in which state of the process, as he must be presumed to be free from guilt, he ought not to be required to hold up his hand at the bar. It is a sort of insult offered to innocence; nor is the ceremony of kneeling at the bar, as if justice were the consequence of intreaty, less liable to objection. In the former practice, though dispensable (for any criminal may refuse to hold up his hand) we still pursue the steps of our ancestors;

preferred either by private persons or by the whole commons of England: and likewise the dernier resort to correct the errors of inferior judicatures; and when any matter of fact was to be tried, it was usual to issue writs to the Justices in Eyre, to summon the parties before them, and to try the fact according to the command of the writ, as may be seen in *Ryley 74, 75.* Gilbert's *Forum Regium*, p. 8.

De Mor. Germ. c. 12.

\* Lord Bacon mentions a Welshman, who, when summoned to comply with this ceremony, conceived the judge to be a fortune-teller.

tors;



tors; the latter doth not appear to have been  
anciently used."

It is the law of the land, and certainly  
ever hath been so, that a prisoner ought not  
at any time to be charged with fetters; un-  
less the jailer be constrained to have recourse  
to them by the actual necessity of safe custody.

In the trial of the regicides it was determin-  
ed by all the judges, "that when prisoners

"come to the bar to be tried, their irons

"ought to be taken off, be their crimes ever

"so great." And this agreed with Fleta, i.

"Cum autem capti in judicio produci debeant;

"non producantur armati, sed ut judicium re-

"cepturi, nec ligati, ne videantur responderi

"coacti." Yet Pratt, Chief Justice, in the

trial of Laver, ventured to make a distinc-

tion

"State Trials, vol. i. p. 83. D. of Norfolk's Trial,

A. D. 1571. And p. 157. Earl of Arundel's Trial,

"Grand question est, que prisonner soit charge de ferres,

ou mis en prison, avant que soit atteint de felony.

Myrror, c. 5. Dist. 5. p. 11.

Kelyng's Reports. L. i. c. 1.

My Lord (said Laver) I have been used more like

"an Algerine captive, than a freeborn Englishman; I

"have been dragged through the streets by the hands of

"jailers, and have been made a show, and spectacle. I

"now hope to have these chains taken off, that I may have

"the free use of that reason and understanding which God

"hath given me; they have brought the strangury upon me

"to

tion between the time of arraignment and the time of trial, and would not allow the chains to be taken off. His Lordship did not consider, that the distraction of the mind, in so painful and important a crisis, ought not to be aggravated by the tortures of the body. *The rights of the unhappy have been rarely violated in modern times.*

It is thought by a very learned writer, that the dreadful punishment, inflicted on a refusal to plead, (even when the offender, if convicted, would be entitled to the Benefit of Clergy), was unknown to the common law, and derived from a statute of Edward I. Be this as it may, it still exists in full force; though repugnant to the spirit of our constitution, and nearly allied to torture, which was always illegal, though sometimes practised. *The Commentaries on the laws of England*

is not unusual in England to state in the reign of Henry II. that the punishment was of a very painful degree; and I am told your Lordship is of the same opinion. *This was argumentum ad hominem; but it was ineffectual.* Observations on the ancient statutes, p. 62. Foster, 244. Rulw. 1. 638. "The Judge (saith Sir Ed. Coke 3 Inst. p. 25.) is never present at any torture; neither, upon the arraignment of the prisoner, is any torture ever offered." These words seem to admit the use, but the subsequent passage in the same volume, p. 35, denies

England have, in very pathetic terms, called for the legislative abolition of this cruel process; and surely it would be easy in felonies, as in the case of treason, to consider an obstinate refusal to plead, as a confession, and conviction of the charge; or even as a plea of Not Guilty, which is the practice of the Scotch courts, and probably derived from the civil law.

But alternatives, though preferable to absolute neglect, are an insufficient species of medicing, when the cause of the disease is suffered to remain. If the forfeitures, annexed to the conviction of the crime, were in all cases equally extended to the contumacy

denies the legality. "There is no law to warrant tortures in this land, nor can they be justified by any prescription, being so lately brought in."

B. iv. p. 223.  
*Nihil interest heres quis an taceat interrogatus; an taceat respondens ut incertum dimittas interrogatorem.* Dig. ii. 1. 11. 7.

It was not unusual in England, so late as in the reign of Charles the Second, to force criminals to plead, by tying their thumbs together with compressed whips. See Kelyng, p. 28. And there were, even in the reign of Q. Anne, occasional instances of this practice, which was certainly a species of torture in the worst sense of the word, though calculated to save the prisoner from the *peine forte et dure*.

See Mr. Emlyn's Preface to the State Trials, of



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of standing mute, there would be no temp-  
tation to commit the offence; which, in the  
present state of the law, is generally found-  
ed on the becoming principle of parental ten-  
derness. The price of blood should not be  
received by the legislative functionary.

§ 9. It was formerly usual for the prisoner,  
if he thought the charge indefensible, to con-  
fess the indictment, and be admitted, on his  
own request, to become an approver against  
others of the same felony; upon the convic-  
tion of whom, he was entitled to his pardon.  
This practice never was prohibited by law,  
but gradually discouraged and refused; for  
“the truth is (saith Sir M. Hale) that more  
“mischief hath come thereof by false accu-  
“sations of desperate villains, than benefit to  
“the public by the discovery and convic-  
“tion of real offenders. Yet I observe, with  
reluctance, that certain modern acts of par-  
liament have in some degree unwarily re-  
vived this dangerous doctrine, by the fre-  
quent offers of rewards and pardons to capi-  
tal felons, on discovery and conviction of

4 and 5 W. and M. c. 18. 10 and 11 W. III. c. 23.  
5 Ann. c. 31. 29 Geo. II. c. 30. 6 and 7 W. III. c. 23.  
§ 9. 6 Geo. I. c. 23. 8 Geo. II. c. 20.  
Finch, 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400.

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their accomplices; and in some instances, it is expressly provided, that the sums of money to be given to the apprehenders, and convicts of felons, shall not incapacitate their testimony. The price of blood should in no case receive the legislative sanction.

In Italy (says Pufendorf) pardons are sometimes promised by public edict to any of the banditti, that shall bring with him the head of another, of the same gang. It may be good policy to raise mutual jealousies among villains; but there is something horrid in the idea of murder, by law established.

§ 10. But, if the defendant thought it advisable to plead, he was entitled first to pleas declinatory of his trial; namely the plea of sanctuary, which was followed by attainder, and forfeiture of land and goods; and the plea of clergy, which soon ceased to be pleaded, until after conviction; it being more beneficial to the party, to take the chances of an acquittal in the course of the trial.

18 Geo. II. c. 16. § 9. Upon the actual abjuration, 2 Hawk. 52. Finch, 389. 3 Inst. 217.

Of

Of the former of these pleas I have already given a short account; and I feel little inclination to enter more largely on the latter. Mr. Justice Foster has very forcibly observed, that "it was an absurd distinction between subject and subject, originally owing to downright impudence on the one part, and to mere fanaticism, or amazing pusillanimity on the other." During a long course of years, it exempted convicted offenders, if qualified for holy orders, from the punishment of offences of the most atrocious kind, murders not excepted. And in many cases a conviction, and having clergy, conduced more to the safety of the prisoner than an acquittal. For he was thereby, until stat. 8 Eliz. discharged of *all* crimes committed before clergy had; but if he had been acquitted, he was liable to answer for any others committed prior to his acquittal. The reading of a strap of Latin, *Miserere mei, Deus,*" called with great propriety "the Neck verse," was the criterion of this senseless privilege. Women, and all persons unable to read, were exposed without mercy to the literal rigour of the law. It

<sup>1</sup> Foster, p. 306.

<sup>2</sup> Kelyng, 103. Dyer, 214. 1 And. 112.



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was a great offence in jailers to teach criminals to read during their imprisonment, previous to their trial; *Per cause de salvation de leur vie, et destruction de la common ley, en decess del roy*. Many illiterate persons were actually executed for clergyable felonies; and Lord Chief Justice Helyng informs us, that he, in the year 1665, fined a bishop's chaplain, for having reproached his sacred function, and abused the court, by answering "*legi*" upon the demand of "*legit aut non legit*?" Whereas in truth the prisoner, when examined by his Lordship himself, could not read, and was thereupon not admitted to his clergy.

Women, in cases of grand larceny to the value of ten shillings, were admitted to clergy by the 2<sup>d</sup> James I. The wall of partition was at last entirely removed by the statute of 3 & 4 W. & M.; which entitles women to the *privilegium clericale*, equally with men; and by the Fifth of Queen Anne, which abolished the whole ceremony of reading.

*Liber Assis*, p. 138. *Observ. on the ancient stat.* p. 331.

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Here

Here it is to be wished, that the legislature had advanced one step further, to an open declaration, that all offences, proper in the first instance to be exempted from capital punishment, and now called clergyable, should hereafter, in that first instance, either be subjected to some inferior species of chastisement, or be considered as pardonable, with a power to the Judges to transport the convicts, whenever the dangerous nature of their crime and character should make it expedient<sup>m</sup>. At present, such offenders, upon conviction, being made to kneel, they know not why; and to pronounce an expression, which they do not understand; find themselves, in the height of their amazement at this cabalistical ceremony, once more upon the wide world in perfect liberty. *It is wonderful, how much the exemplary solemnity of justice may be disgraced by trivial absurdities.* Besides, from the rule that this privilege cannot be pleaded more than once (except by clerks in orders, in regard to whom it is

<sup>m</sup> As was enacted in the cases of great and petty larceny, by statutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. which provisions however do not extend to Clerks in Orders.

still unlimited) it follows, that, when a man commits two offences, both clergyable in their class, but totally different in their kind, as manslaughter and larceny, he must suffer death for the second, though in the eye of reason it hath no perceptible connection with the first.

§ 11. But to return to the ancient mode of prosecution. Let us suppose the prisoner to have pleaded, "Not guilty." Here began his trial; and in the progress of it he was exposed to such dangers, as left him but little security even in the strictest innocence.

The use of Counsel was permitted only on the part of the prosecution, "*because* (saith Sir E. Coke) *that the testimony and proof of the crime ought to be so clear and manifest, that there can be no defence of it.*" This humane reason existed in speculation only; for the ideas of our ancestors, as to the clearness and sufficiency of testimony and proof, were extremely unsettled, and it may almost be asserted, that, so late as the whole sixteenth, and part of the seventeenth Century, the first and most essential principles of evidence were

3 Inst. 29.

list

O 2

either



either unknown, or totally disregarded. Depositions of witnesses, forthcoming if called, but not permitted to be confronted with the prisoners; written examinations of accomplices, living, and amenable; confessions of convicts,

The instances are infinite; I select the following on account of its collateral matter. "Then Mr. Attorney (*Sir Ed. Coke*) took in hand the evidence against Sir G. Merrick, and Mr. Cuffe. To Cuffe, Mr. Attorney said, that he was the arrantest traitor that ever came to that Bar. And still following matters strongly against him, told him, that he would give him such a *Cuff* as should set him down: and thereupon called to have read the (*late*) Earl of Essex's confession, and also a part of Sir Henry Nevil's confession; which were both full and plain against him, as he had not to answer them." State Trials, vol. vii. p. 59.

But the trial of Throckmorton in the preceding reign, before many Judges of the first eminence in that age, was still more remarkable. The confession of Winter was read against him; and he was told, that if he should deny it, he should have Winter to justify it to his face; the confession of the Duke of Suffolk, who had been executed on the same accusation, was also read against him; the testimony of Vaughan, then under sentence of death for the same fact, was received in support of the prosecution; the testimony of Fitzwilliams offered in favour of the prisoner was rejected, and the prisoner acknowledged that it was unusual to examine witnesses against the Crown. A part of his own confession was read against him; and when he requested that the whole might be read, he was answered, "that it would be but loss of time, and would make nothing for him." Lastly, when he desired that an Act of Parliament might be read, he was answered, that it was not the business of the Court to find books for him, and that the Judges were to resolve all doubts in Law.

State Trials, Vol. i. p. 63.

lately

lately hanged for the same offence; hearlays of those convicts, repeated at second hand from others; all these formed so many classes of competent evidence, and were received as such, in most solemn trials, by very learned Judges.

It was sometimes agreeable to the counsel for the Crown, and suitable to the nature of the case, to conduct the proofs by parole testimony: a circumstance most unfavourable to the Defendant, as it tended to throw the whole weight of credibility into the adverse scale. For the person accused was rarely permitted to call witnesses to his exculpation; and, even when indulged so far, he was not in any case allowed to examine them upon oath. At the same time, there was frequent practising on the hopes and fears of the witnesses by the alternate encouragements and menaces of the counsel for the prosecution; and juries were reminded, that, for verdicts contrary to the inclination of the court, they were liable to unlimited fines and imprisonments. This indeed they had learnt by fatal and re-iterated experience; but they were rarely in want of any memento; for it was a common, and very lucrative

OF PRINCIPLES

practice with the sheriffs, to return juries so prejudiced, and partial, that, as Cardinal Wolsley observed, they would find Abel guilty of the murder of Cain.

The Judge held his office, and income, during the pleasure of the prosecutor; and was often actuated by an intemperate zeal in the support of the charge; as if his indignation at the offence had stifled all tenderness towards the supposed offender.

Thus, ignorant of the forms and language of the whole process, unassisted by counsel, unsupported by witnesses, discountenanced by the court, and baited by crown-lawyers, the poor bewildered prisoner found an eli-

Observations on the ancient statutes, p. 360.  
It may safely be affirmed, that the present independence of our Judges is the best safeguard of our constitutional liberties. The stat. 1 Geo. III. c. 23. engrafted on 13 W. III. c. 12. hath completed that independence, in regard to the King, his Ministers, and Successors; and in the security of the full salaries during the continuance of the commissions. Yet it deserves serious consideration, whether those salaries, amidst the general opulence of the kingdom, be more than barely sufficient to support the state and dignity of the offices to which they are annexed. It is of essential importance to every individual in the nation, that the seats of Justice should continue to be filled by men the most eminent in their profession for Wisdom, Learning, Experience, Benevolence and Integrity.

gible



gible refuge in the dreadful moment of conviction.

12. This short sketch of the administration of criminal justice in the sixteenth century diminishes the surprize, which we should otherwise feel, when we are told, that in the reign of Henry VIII, seventy-two thousand criminals were executed, which, upon an average, is nearly equal to six every day, Sundays included. The same authority assures us, that executions were reduced to about one fifth of this proportion in the latter end of Queen Elizabeth's reign. The annual number is at present estimated at one hundred.

Thus "when people of all ranks and conditions had, in their turn, been taught moderation in the school of adversity," Reason and Mercy gradually prevailed; but an ample field is still open to the exertion of their influence.

The perusal of the first volume of the English State Trials is a most disgusting

Holingshead. See Observations on the ancient statutes, p. 402.

Foster, 235. O 4 drudgery;

drudgery: but it is impossible to survey that chaos of oppressions, so long existent, and so patiently borne, without being astonished at the foundation, on which the beautiful fabric of our present liberties is raised.

## CHAP. XVII.

### *Of other Crimes immediately relative to the State.*

**U**NDER this head are proper to be considered all offences, below the degree of treason, which amount to violations of the prerogative, or infractions of the public peace; and, in short, all the inferior offences, which directly affect the King, and his government.

It is said, that in Japan, every breach of any law of a public nature, and every disobedience to the Ministers of justice, is considered as a personal affront to the Emperor, and punished as a capital crime\*. The con-

sequence

\* A similar account is given of the course of justice in Persia, where every crime is considered as a breach of the

com-

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sequence is evident: the Emperor's authority is universal and unlimited. An authority so unnatural is not likely, if it be allowed possible, to be supported, without a constant violation of the rights of nature.

The human mind is delighted with the exercise of power, and at the same time incapable of indulging an extreme eagerness in any pursuit, without running into absurdity. Hence it follows, that the penal laws of despotic states are both wanton and sanguinary; adapting the punishment of death, like the bed of Procrustes, to offences of all sizes and denominations. Very different should be the sentiments and practice of that envied nation, which hath discovered, and established, a permanent system of government, in the happy medium between lawless liberty, and absolute despotism.

§ 23. An accurate examination of this species of crimes would lead me into a tiresome detail; I shall confine myself to some of the most striking instances.

commands of the Ynca, who is revered as something more than human, Garcilasso de la Vega, Com. Reg. l. ii. c. 12, 13.

The



The mere knowledge and concealment of treason, without any degree of assent thereto, is called in our law, a misprision of treason; and is punished with the loss of the profits of lands during life, forfeiture of goods, and imprisonment during life. It is also by 14 Eliz. c. 3. a misprision of treason to forge any foreign coin, though not made current by proclamation. By statute 9 Ed. III. stat. 2. the sterling money shall be melted down, upon pain of forfeiture thereof. This law is written in a very different spirit from the statute 8 and 9 W. III. c. 26. which enacts, that, if any person shall receive, or pay any counterfeit, or diminished money of this kingdom, at a less rate than it shall import to be of, he shall be guilty of felony.

By 9 Geo. II. c. 30. enforced by 29 Geo. II. c. 17. if any subject of Great-Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the King's sign manual, he shall be guilty of felony without benefit of clergy—a very severe law!

Pb. and M. c. 10. Previous to which statute, every concealment, under the construction of aiding and abetting, seems to have been considered as treason.

Desertion

Desertion from the King's armies in time of war, is also made a capital felony by 3 Edw. VI. stat. 2. and the offence is made triable by the justices of every shire. This offence was subjected by the laws of Canute to the loss of life and lands.

Prison-breaking by the offender, when lawfully committed, was at the common law a felony in every case; but by stat. 1. Edw. III. no person shall for breaking prison have judgement of life or member, except the cause for which he was imprisoned would

*Servus etiam aufugiens a domino suo vel a socio suo per seignitatem suam, sive sit in navali expeditione, sive in terrestri, perdat omne quod habet, et propriam vitam, et capite dominus possessionem illam et terram ejus quam ipse possidet de diti. Et si propriam terram habeat, regis manibus ea tradatur." Leges Cnuti 75.*

It was anciently the custom in France to cut off the ears, or slit the nose, of the deserter; and it was absurd, says Montesquieu, to relinquish this practice for the punishment of death. Soldiers are habituated to the contempt of death, and the dread of shame; so that the terrors of the penalty were diminished, while they were intended to be increased." L'Esprit des Loix, l. vi. c. 12.

Charondas, the lawgiver of the Thuriars, enacted that deserters should be compelled to sit three days in the market-place clothed in female dresses; and this law, says the Historian, excelled the provisions of other lawgivers on the same subject both in humanity and wisdom. Diod. Sic. l. xii. c. 16.

Have had such judgement, if he had been duly tried and convicted.

Our law, even with this mitigated severity, seems to bear, with some degree of harshness, against the natural impulse of self-preservation<sup>2</sup>.

The rescue or forcible freeing of another from an arrest, or imprisonment, is also, in many cases, a felony without benefit of clergy.

The unlawful assembling, to the disturbance of the peace, by any twelve persons, who, being so assembled, shall continue together for one hour, after proclamation made to disperse, is capitally punished by statute, 1 Geo. I. c. 5.

All forcible acts of smuggling, carried on in defiance of the laws, are by stat. 19 Geo. II.

<sup>2</sup> I shall transcribe the words of a very ancient writer on this subject:

*"Abusien est à tenir, escape del prison, ou de bruserie de gaole, per peche mortelle, car cell usage n'est garrant per nul ley; ne en nul partie est use, forsque en cest realme et en France; ain est len garrantie de ceo faire per ley de nature."* Myrror, p. 283.



§ 34. made felonies without the benefit of Clergy.

In this branch of the penal system, law-givers should be extremely cautious, not to confound atrocious breaches of the civil contract, with simple violations of the police.

## CHAP. XVIII.

### *Of Murder.*

§ 1. **A**N English gentleman, ignorant of English law, (in which predicament there are some) would probably confine his ideas of homicide to the two divisions, of "murder" and "excusable killing;" and, when informed, that the law of England comprehends several other classes, both in name and punishment, would profess himself unable to discover any ground of further distinction.

"The act of homicide (he would say) is either murder, or it is not so. The intention of the killer is the criterion; and the malignity

“malignity of that intention is in the nature  
 “of a single, controverted fact, subjected to  
 “enquiry, and capable of strict proof. If  
 “that malignity be not suggested, or if on  
 “suggestion it be disproved, the act of kill-  
 “ing becomes, as to civil guilt, negative,  
 “and excusable.”

There is something in the first view of  
 this position very plausible. An English  
 lawyer would give the following answer  
 to it.

“The act of homicide is either occasioned  
 “by mere accident, or founded in the dis-  
 “pensations of public justice, or in self-pre-  
 “servation, or in a sudden transport of passion,  
 “or in malice; and, in these different views,  
 “it is capable of a great variety of gradations,  
 “from absolute innocence to the most aggra-  
 “vated guilt.

“True (it would be replied); every crime  
 “hath its proper degree of enormity, variable  
 “as the mind of the criminal; but you mis-  
 “apply the property of the crime to the act  
 “on which the crime is founded. That act,  
 “in itself, and abstractedly considered, is a  
 simple

of simple consequence of the attributes of  
 a matter; unfortunate indeed and pitiable;  
 but neither culpable nor punishable, until it  
 be proved to have co-operated with a mis-  
 chievous intent. When that proof is given,  
 then, and not before, it becomes criminal;  
 under the appellation of murder.

Here then we are reduced to state the law  
 as we find it; and to leave its doctrines to  
 their own support and defence.

§ 2. I begin with that class to which our  
 laws annex no idea of guilt; and which is  
 called justifiable homicide. It is founded on  
 necessity, and, in some instances, on the po-  
 sitive precept of law.

Such is the case of the Judge who passes  
 sentence of death upon a convicted criminal,  
 and gives the warrant for his execution; and  
 such, more immediately, is the case of the  
 Sheriff, who causes that warrant to be ex-  
 ecuted. On this point it hath been holden,  
 that, "if the execution vary from the judge-

x Hale's Hist. P. C. ii. 411. And Bracton, l. iii. p. 104.  
 "non alio modo puniatur quis, quam secundum quod se habeat  
 condemnatio.

"ment,



"ment, it will be murder in the Sheriff." But this must be understood \* of such a varying only, as tends to aggravate the punishment beyond the intention of the law; not of any mitigation, in regard to the pain, or infamy of the sentence, at the same time consistent with the substantial justice of the case.

Women, convicted of either high or petty treason, are directed by judgement of law *to be burnt in the fire, till they be dead*; yet Sheriffs have generally had humanity enough to direct them to be strangled before the fire can affect them. It is the sentence of traitors, to be hanged by the neck, *but not till they be dead*; yet it is now the practice\*, and very properly, not to suffer them to be cut down, in order to the subsequent mangling of their bodies, whilst any appearance of life remains.

\* Foster, p. 269.

\* Ashton, Jan. 19, 1690, at the Old Bailey; and Matthews the printer, Oct. 30, 1719, at the same place, were sentenced for high treason; and were hanged until they were dead, without even any subsequent quartering or beheading. State Trials.

Upon

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Upon the same principle of mercy, a curious doubt hath arisen on this sentence of treason; whether, if the King should in any case remit all but the hanging, it would not be murder in the Sheriff, to hang the criminal until he be dead.

But I proceed to that homicide, which is justifiable by permission of law; and such it is, when any man resisteth persons in the due course of justice, having authority to take, or imprison him, though perhaps he may be innocent, and is killed in the struggle. This rule is founded on reason and public utility; *but there should be an apparent necessity on the side of the officer.*

The same benignity of construction is extended to homicide, committed by any person, interposing to preserve the public peace, and prevent mischief; for such interposal is a branch of social duty.

The ancient expression, in the case either of flight, or of resistance, was, "quod iusticiarii se non permittit." Pasch. 16 Ed. III. coram rege, Rot. Norff. "*Viccomes domini regis, qui interfecit duos latrones non permittentes se iusticiari, acquietatur.*"

In like manner, officers, endeavouring to disperse a riotous or rebellious assembly, are justifiable, both by the common law and by statute<sup>c</sup>, though death should ensue. *But here also there should be an actual, existent necessity*, otherwise it will be murder; and of this necessity the law will exact a rigorous proof. And though it hath been adjudged, that those who attend the Justices, in order to suppress a riot, have power to take with them such weapons, as shall enable them *effectually*<sup>d</sup> to do it; yet the misapplication of that power to wanton or tyrannical purposes, will be most severely construed. It is indeed a power dangerous to the constitution, and to be guarded with jealousy against all abuse.

Lastly, homicide is justifiable in the resistance of any capital crime, attempted and accompanied by violence. As<sup>e</sup>, in the case of

<sup>c</sup> Hale, H. P. C. i. 465. Hawk. P. C. i. 161. Popham, 121, 122. And stat. 1 Mary, c. 12. 1 Eliz. c. 16. which were both temporary acts. And 1 Geo. I. c. 5. to the same purport; which is perpetual.

<sup>d</sup> Hawk. P. C. i. 161. § 21.

<sup>e</sup> “*Hadrianus rescripsit eum, qui stuprum sibi, vel suis, per vim inferentem occidit, dimittendum.*” Dig. l. xlviii. t. 8. § 1.

any



any woman, who kills a ravisher in defence of her chastity ; or of any traveller, who, in the immediate defence of his property, shoots a highwayman ; or of any person who kills another in an attempt to commit burglary. The same idea prevailed in the civil law. *Furem nocturnum si quis occiderit, id impune feret, si parcere ei sine periculo suo non potuit.* And again, *si quis percussorem ad se venientem gladio repulerit, non ut homicida tenetur ; quia defensor propriæ salutis in nullo peccasse videtur*<sup>f</sup>.

But here it is observable, “ that our law “ will not suffer any crime to be prevented “ by death, unless the same, if committed, “ would have been capitally punishable.” Hence it hath followed, that, though it be lawful for a man to kill another, whom he detecteth in the night-time, in the act of carrying away his property ; yet if he take another in the act of adultery with his wife, and kill him, it will be manslaughter and felony. Such is the law, though in fact it hath been executed with great benignity<sup>b</sup>. And surely,  
if

<sup>f</sup> Domat. l. ii. p. 638.

<sup>g</sup> Commentaries, B. iv. 102.

<sup>h</sup> John Maddy was (23 C. II. in B. R.) indicted for murder, and the jury gave a special verdict ; “ that he  
P 2 coming

if the former case be justifiable, the latter, though it favour more of sudden revenge, than of self-preservation, ought to be so *a fortiori*; for adultery is the highest invasion of property. The Athenians comprehended both these

cases coming into his house, found the deceased in the act of adultery with his wife, and immediately struck him with a joint stool on the head, so that he died; they also found that there was no precedent malice, and the court were all of opinion, that it was *but* man-slaughter, the provocation being exceeding great; and the executioner was directed to burn him gently." But Twissen, Justice, remembered a case, in which the prisoner, being informed of the adulterer's familiarity with his wife, said, that he would be revenged on him, and afterwards, finding him in the act, killed him, *which was held by Jones to be murder.* Ventris i. 159. Raymond 212.

<sup>1</sup> A fine comment on this Law of the Athenians may be found in the Oration of Demosthenes, *Kata Apisxeoatov.*

The Athenians not only gave the construction of justifiable homicide to the death of the adulterer; the injured husband was, by another law, permitted to exercise his vengeance in whatever manner he might prefer. "Si quis adulterum in ipsa turpitudine deprehenderit, de eo, quod libuerit, statuito."

Οὐκ ἔστι μοιχῆς πρᾶγμα τιμωτέρον,

Θανάτος γὰρ ἔστιν ὀνιον.

Menandri Fragm.

Py. Ille ubi rescivit factum, frater violentissimus.

Pa. Quidnam fecit? Py. Colligavit eum miseris modis.

Pa. Colligavit? Py. Atque equidem orante, ut ne id faceret, Thaide.

Pa. Quid ais? Py. Nunc minatur porro, sese id, quod moribus solet.

Quod ego nunquam vidi fieri, neque velim.

Ter. Eunuch. V. 5. 11.

Necat

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cases in the same law, and permitted no degree of punishment in either of them. If it be true, that *positive laws, contradictory to natural sentiment, are cruel and dangerous*; it is an imperfection in our system, that it hath not adopted the same regulation.

§ 3. The next species is Excusable Homicide; and first, *per infortunium*: as when a man doing an act, not unlawful, and without a mischievous intention, and using proper, that is, usual, or ordinary circumspection, happeneth to kill.

If however the act, on which death ensueth, be unlawful only as *malum prohibitum*; if (for instance) it should consist in shooting at game without a statutable qualification, it

*Necat hic ferro, secat ille cruentis  
Verberibus, quosdam mæchos et mugilis intrat.*

Juv. x. 315.

*Ab tum te miserum, malique fati,  
Quem attractis pedibus, patente portâ  
Percurrent raphanique, mugilesque.*

Catull. xv. 17.

See also Aristoph, Plut. ver. 168.

The Roman Law, in some degree, permitted the killing of the adulterers. *Is, qui uxorem in adulterio deprehensam occidit, humiliore loco positus, in exilium perpetuum dandus; in aliqua dignitate positus, ad tempus relegandus.* Inst. l. i. § 5.



is not under that description to be considered as an unlawful act.

Secondly, by self-defence; as when a person, in the course of a sudden and dangerous affray, which leaves no power consistently with security, to wait for the intervention of the law, retreats as far as he can with safety, and, urged by mere necessity, and to avoid his own death, killeth his adversary.

This idea is finely expressed by Cicero in his oration for Milo. "*Est igitur, Judices, hæc non scripta, sed nata lex; quam non dicimus, accepimus, legimus, veram ex natura ipsa arripimus, hausimus, expressimus: ad quam non docti, sed facti; non instituti, sed imbuti sumus; ut si vita nostra in aliquas insidias, si in vim, si in tela aut latronum aut inimicorum incidisset, amnis honesta ratio esset expectanda salutis: silent enim leges inter arma; nec se expectari jubent, cum ei, qui expectare velit, ante injusta pœna luenda sit, quam justa repetenda.*"

But in both these cases of homicide, by mere accident, and by self-defence, it must appear, that there was no deliberation previous

vious to the act; and even then, they are by our law<sup>k</sup> subjected to forfeitures, not only of the thing, or instrument, which was the immediate cause of the death, but of the goods or chattels of the party. The latter have long been remitted in both cases, upon a pardon under the great seal, and a writ of restitution; and to prevent such expence, in the case of homicide *per infortunium* it is usual for the judges to recommend a verdict of acquittal.

And here it is well observed by Mr. Justice Foster<sup>l</sup>, that “Judges are ministers, appointed by the crown for the ends of public justice, and should have written on their hearts the solemn engagement of their king in his coronation-oath, to *cause law and justice in mercy, to be executed in all his judgements*; that it is not therefore the part of judges to be perpetually hunting after forfeitures, where the heart is free from guilt; to heap afflictions on the head of the afflicted, and to wound a heart already wounded past cure.” And surely, it may be added, that it cannot be the part

<sup>k</sup> Ever since the statute of Gloucester, 6 Edw. I.

A. D. 1278.

<sup>l</sup> Foster, p. 264.

of lawgivers to permit forfeitures in such cases.

A great writer apologizes for such forfeitures<sup>m</sup>, by supposing the law to set so high a value upon the life of a man, that it always intends some misbehaviour in the person who by any means takes it away; *presuming* a fault, negligence in the case of misadventure, and an unknown wrong or provocation, in homicide by self-defence. But it is difficult to conceive a mixture of criminality in mere accident, or that there can be "*necessitas culpabilis*," in self-preservation. The law should be an indulgent parent, not an ungenerous step-mother.

It is indeed the duty of law, if I may be allowed the expression, to look with a very jealous eye on every action which hath a tendency to bloodshed; and it may by some, perhaps, be thought the wisdom of law, to affix some mark of disapprobation on every actual instance of bloodshed, however casual or blameless: but it is repugnant both to the duty and wisdom of law, to seek any ends by

<sup>m</sup> Commentaries, B. iv. 186.



the harsh and unseemly intervention of subterfuges and fictions. *The candor of legislation should ever be inviolable.*

The true cause of forfeiture, in cases of excusable homicide, was well known to our Saxon and Norman Kings; who did not seek any refinements of reasoning to support this very considerable branch of their royal revenue. They believed themselves to possess a valuable, ascertainable property in the lives and limbs of their subjects. Fines therefore were imposed in all cases of death and mayhem, and proportioned to the degree of the person killed or hurt. In the earlier periods of our history, a fine, or composition, was given to the relations of the deceased also. But when judges, properly so called, were established; and when individuals had given up the right of avenging their own

101<sup>a</sup> *Si mulier occidatur prægnans, et puer in ea fuerit vivus uterque plenâ verâ (Vir-gelt, the price of a Man) reddatur; si nondum vivus sit, dimidia verâ solvatur parentibus ex parte patris.* Vide Leges Henrici I. c. 70. which contain many curious particulars on the subject of compositions.

The same notions prevailed among the ancient Germans; *Equorum, pecorumque numero convelli mutantur; pars mulæ regi vel civitati, pars ipsi, qui vindicatur, vel propinquis ejus exsolvitur.* Tacit. de M. G. c. 12.

wrongs;

wrongs; the whole of this traffick was gradually transferred from private hands to the public treasury. The innocence of the intention, says a law of Henry the First, shall make no difference as to the composition; *five sponte, aut non sponte fiunt hæc, nihilominus tamen emendetur: Quæ enim per inscientiam peccamus, per industriam corrigamus.* Such reasoning tended to annihilate all distinction between voluntary and involuntary acts; compositions for crimes became as common in the courts, as compositions for sins in the churches; and they were extended even to the most atrocious murders, in the same manner as to accidental deaths. Earl Godwin was adjudged by the Wittenagemot, to pay twelve handfuls of gold to Edward the Confessor for having killed his brother; and the hundred of Boctone<sup>p</sup> was fined two marks for the default of a certain maid servant, *who was present*, when a horse struck a man, and killed him.

Yet there seems some reason to collect from Bracton, that, by the common law, there were no fines on death per Infortunium; except in places where a contrary usage had particularly prevailed. "*Item, de iis, qui Mortui sunt per Infortunium, nullum erit Murdrum, licet in quibusdam partibus de consuetudine aliter observetur.*" De Coron. c. 15. § 16.

<sup>p</sup> Madox, Hist. Excheq. c. 14. § 15.

It

It seems however to be the better opinion, that in the cases of homicide *per infortunium*, or *se defendendo*, the forfeiture of the whole never was incurred at common law. For it was not unusual, to pay the mulct or fine in horses, hounds, hawks, honey, &c.; and if the person who had committed the Homicide, Foster, p. 287.

This fine was called *Murdrum*.  
“Vicecomes reddit compotum de x Marcis pro uno murdro in hundredo de Hereford.”

“Lulius de Alstredaga reddit compotum de cc Marcis argenti, et x fugatoribus, et x accipitribus pro morte Gamel, in thesauro xl Marcas argenti; et debet clx Marcas Argenti, et x fugatores et x accipitres.”

“Stephanus filius Farchembaldi reddit compotum de x marcis argenti pro interfectione hominis Willemi filii Odonis.”

“Odo filius Alsi debet lxs pro occisione filiorum Jochi.”

“Oliver de Cail and others fine pro eadem occisione.”

I have selected these instances from the reign of King Stephen. See Madox, c. 14. 6.

In the same sense the word is used in the 26th chapter of the Stat. of Marlbridge. “Murdrum de cetero non adjudicetur, ubi infortunium tantummodo adjudicatum est, sed locum habeat murdrum de interfectis per feloniam tantum,”

Fines, as a composition in cases of wilful Murder, are at this day common in Mahometan countries, and are established on a positive precept of the Koran. See b. i. chapter of the Cow; and Chardin, Voyage de Perse, t. iii. p. 299)  
“If any one forgive the blood of his brother, he may pursue the malefactor for damages and interest; but he who shall injure the wicked after having received satisfaction, shall in the day of Judgement suffer the most grievous torments.”

cide



cide were too poor to pay it, or had fled, or could not be discovered; the Vill, wherein it was committed, or, if that were too poor, the whole hundred was subjected to a fine.

The same ideas seem to have prevailed in all the cotemporary governments of Europe; and the principle, on which they were founded, appears to have retained a very lasting influence in our laws.

*"Vita et membra sunt in manu regis,* says "Sir Edward Coke"; nay, the Lord of the "Villeine, for this cause, cannot mayheme "the Villeine, but the King shall punish "him for mayheming of his subject; for that "hereby he hath disabled him to do the "King's service, by fine, ransom, and imprisonment until the fine be paid." "And "in my circuit in Anno 11 Jacobi, in the "county of Leiceſter, one Wright, a young, "ſtrong, and luſty rogue, to make himſelf "impotent, thereby to have more colour to "beg, or to be relieved without putting himſelf to any labour, cauſed his companion "to ſtrike off his left hand, and both of

Co. Litt. 127. B.

"them

"them were indicted, fined and ransomed  
"therefore" and that by the opinion of the  
"rest of the Judges."

The law of Spain, far from allowing forfeitures in homicide by self-defence, gravely observes, "that it is better for a man to defend himself, when alive, than to leave it to others to avenge him, when he is dead."

As to homicide *per infortunium*, it is true, that it was subjected by the Athenians to banishment for a year; but it should be observed, that this was not in the nature of a punishment, but rather a protection to the unfortunate person from the impetuosity of revenge; for if, previous to his departure

By a declaration of Lewis XIV, A. D. 1677, "les criminelles condamnés à servir sur nos Galeres, comme forcats, lesquels après leurs jugemens auront mutilé ou fait mutiler leur membres, soient punis de mort pour réparation de leur crime." Code penal. p. 139.

See the Observations on the ancient statutes, p. 55.  
See Euripid. Orest. ver. 511—518. and the Iliad, l. xxiii. ver. 85. and Petit. Leg. Att. p. 609. "Qui alium casu fortuito necasset, in annum deportator, donec aliquem e cognatis occisi placasset; revertitor vero peractis sacris et lustrationibus."

A full comment on this Law may be found in the latter part of the Oration of Demosthenes against Nausimachus.

or during his absence, he were able to satisfy the relations of the deceased, the exile ceased from that moment. And indeed, the Athenians\*, as well as the Romans, seem to have formed very clear distinctions upon the different instances of homicide.

§ 4. The English law describes a third species of homicide under the name of manslaughter. This, though in the first instance within the benefit of clergy, is made highly criminal and felonious; and the offender shall be burnt in the hand, and forfeit all his goods and chattels. And if for any previous felony,

\* The ingenious writer of the "Historical Law Tracts," seems (p. 33.) rather inadvertently to have made a different assertion. The words of Solon's Law are very remarkable, *φόνος καὶ τραύμαλος ἐν ποροίᾳ*. Again, the punishment of death was annexed to wilful murder, *Τὸν ἐν ποροίᾳ ἀποκτείναντα θανάτῳ ἑψησέθαι*.—And if the Murderer withdrew before conviction into banishment, he was subjected to a total forfeiture; but the other instances of homicide were not liable either to corporal punishment or forfeiture.

The Roman Law proceeded expressly on the same principles; *In Maleficiis voluntas spectatur*. And Hadrian declared by Rescript, "*Eum, qui hominem occidit, si non occidendi animo hoc admisit, absolvi posse: leniendam pœnam ejus, qui in rixâ, casu magis quam voluntate homicidium admisit*." And by another rescript of one of the Emperors, "*Infans vel furiosus, si hominem occiderint, lege Cornelia non tenentur: cum alterum innocentia consilii tueretur, alterum fati infelicitas excusat*."



as for sending live sheep out of the realm, or for harbouring offenders against the law of customs, or for having solemnized a clandestine marriage, or for any other fact of the most foreign nature, he should have used his plea of clergy, *not being a clergyman*, he is then in the first instance of manslaughter subjected to the pains of death.

I have stated the punishment previous to the definition of the offence; because many most ingenious and learned writers have, on this subject, as on many others, expatiated, with more liberality than reason, on the merciful disposition of the English government; as if it were their object rather to write the panegyric, than to make known the imperfections, of the constitution.

We are told<sup>1</sup>, "that the benignity of our law imputeth manslaughter to an infirmity, which is incident to the human frame;" yet manslaughter is a capital offence. We are told<sup>2</sup>, "that our law pays such respect to human frailty, as not to put a hasty, and a deliberate act upon the same level of guilt;" yet it will appear,

<sup>1</sup> Foster, p. 290.

<sup>2</sup> Commentaries, B. iv. p. 191.

that

that both manslaughter and murder may be committed, without any intent to do personal mischief, and without any mixture of deliberation whatever.

Manslaughter is agreed to be, the killing of another without malice, express, or implied; either voluntarily, upon a sudden heat; or involuntarily, in the commission of an unlawful act.

Voluntary manslaughter, (which, being an act of homicide without either a legal or a personal necessity, is therefore neither justifiable nor excusable) ensueth most frequently upon some provocation given, or supposed to be given. But words of reproach, and contemptuous gestures, are in no case sufficient to free the party killing from the guilt of murder; *unless* the killing be in consequence of a blow given in a manner, and with a weapon, not likely to kill; or unless, upon the immediate quarrel of the parties, they proceed to blows or fighting; so as to make the whole transaction one continued act of

<sup>a</sup> Hale, 473. 3 Cro. 779. "In the assembly of the Judges, 18 Car. II. this point (says Lord Chief Justice Holt) was positively resolved," Kel. p. 130.

<sup>b</sup> See the case of John Grey. Kel. p. 64.

passion

passion or sudden affray, in which no undue advantage is taken on either side.

There must be some actual assault upon the person killing, to soften, what would otherwise be an act of murder, into manslaughter. But even this indulgence is confined to that sudden impulse of passion, which is supposed to be irresistible; *for, if there should appear to have been a sufficient interval for the voice of reason to be once heard, the act of homicide will then be attributed to the malignant principle of deliberate revenge, and will receive the name and punishment of murder.*

It was enacted in the reign of Hen. II. that if any were killed at any just or tournament it should be no felony; "for that in friendly manner the parties contended to try their strength, and to be able to do the King service in that kind as occasion should be offered."

Involuntary manslaughter happeneth in the case of accidental death, ensuing upon an act

\* Myrror, c. 1. § 13. *des Adventurés.*



unlawful as *malum in se*, but in the nature only of a trespass. But, if the homicide be in consequence of an act felonious in itself, or in prosecution of a felonious intent, it will be murder.

It is not difficult to illustrate this distinction by an example; though I purposely avoid any mention of adjudged precedents, that I may not be led into a long, and wearisome labyrinth of facts. It is extremely dangerous to give any extract from cases of homicide, where every circumstance weigheth "something in the scale of justice," and where imperfect reports have the most fatal tendency.

A man shooting at a bird, and using proper and ordinary caution to prevent danger, unfortunately happeneth to kill his neighbour. The guilt of this man in the eye of our law, and consequently the proportion of his punishment, will depend, partly on the nature, shape, and size of the bird, and partly on the intention of the man with respect to the bird; but will have no connection whatever with the act of homicide.

If the bird chanceth in evidence to prove a wild pigeon, *feræ naturæ et nullius in bonis*, it will be excusable homicide; if a tame fowl, and shot at for the amusement or improvement of the marksman, it will be felonious; and manslaughter, because an unlawful trespass on the property of another; lastly, if the bird were private property and intended to be stolen, which must be collected from the circumstances; it will be murder, by reason of that felonious intent.

Such on this point is the doctrine of our law; and infinite is the variety of constructive crimes, which have been established thereon: the instance, which I have selected; is no exaggeration.

That external, unconnected circumstances should regulate the nature and enormity of crimes,

Kelyng, 117. State Trials, vol. vi. p. 222. Foster, p. 258.

On the same principle, when a man, endeavouring to kill another, and missing his blow, happeneth to kill himself; it is in judgement of our Law *suicidal and deliberate self-murder*. See Hale, H. P. C. l. 413.

In all such instances, the intent of the prisoner, which can only be collected from the circumstances, is evidently and necessarily subject to the sole determination of the Jury.

"that A. shot at the poultry of B. and by accident killed a man,"

crimes, that the intention should be transferred to the accident which results from it, are positions, which, in their present extent, have ever seemed to me most preposterous and unnatural. They bear however the venerable stamp of antiquity; and the errors derived from them, if indeed they be errors, are the accumulation of many centuries.

I proceed therefore with diffident and trembling steps on this hitherto untrodden ground; fearful, though in the pursuit of truth and the defence of natural rights, of wandering into the mazes of absurdity, or

man," would be an insufficient verdict, on which no judgment could be given. The intent of A, with regard to the poultry, ought also to have been found. "If an action unlawful in itself be done deliberately, and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter: not accidental death, because the act upon which death ensued was unlawful."

But quære, How this can be reconciled with another passage in the same book, which saith, "that the court, and not the jury, is to judge the *malus animus*, which is to be collected from all circumstances, and bringeth the offence within the denomination of wilful malicious murder, whatever might be the immediate motive to it." Foster, p. 261. and p. 257.

striking



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striking at the fundamental principles of Government.

It is true, that crimes are to be estimated, in some degree, by the actual mischief done to society; because the internal malignity of mankind is not within the cognizance of human tribunals.

But, if this position were received in its fullest latitude, it would prove too much; it would prove that every act of homicide is equally criminal, and that the intention is in no case to be considered. The following restriction should then be observed, as inviolably connected with the principle. *Every member of society hath a right to do any act without the apprehension of other inconveniences, than those which are the proper consequences of the act itself; for it is the right of every member of society to know, not only when he is criminal, but in what degree he is so. This is the great boundary of political liberty; which gives way to insecurity and danger, whenever the arbitrary inferences of magistracy are admitted within its confines.* Can it be said, consistently with this principle, that the casual consequence of an

intended larceny shall be liable to receive the  
appellation and punishment of wilful murder?  
This may be reconciled to the philosophy of  
slaves; but it is surely repugnant to that mo-  
bile and active confidence, which a free people  
ought to possess in the laws of their constitu-  
tion, the rule of their actions.

Yet there are some cases in which it may  
be reasonable to carry over the felonious in-  
tent to commit one act, to a different act ad-  
fusing in prosecution thereof. As when a po-  
tion is given to the mother to destroy the  
child of which she is pregnant, and it kills  
the mother; this is murder, and hath been  
so adjudged\*. In like manner, "if a man lay  
poison with an intent that B. should take it,  
and C. by mistake takes it, and is poisoned  
to death; this is murder, though it were  
not intended for him". So, "when a  
man intending to burn one house, in exe-  
cution thereof happens to burn another  
house, this is a malicious and felonious  
burning, for it springs out of a malicious

By Sir M. Hale, at Bury, A. D. 1670. Hale's Hist.  
P. C. i. 429.

\* See Agnes Gore's case, Plowden, i. 474. and Hale's  
Hist. P. C. i. 431.

and

of and felonies intent." But in all these cases it should be observed, that the consequence participates the nature of the original crime, and that the general malice of the intention is followed by a fact of the same degree and kind.

When it was said, that involuntary manslaughter happens in the case of accidental death ensuing upon unlawful acts, I ought to have added, that acts lawful in themselves, but done without due care and circumspection, are to be considered as unlawful, and all even as felonious in their construction, if done with a negligence so notorious as to imply malice against all mankind. And on this distinction, a killing, in consequence of a piece of timber or stone thrown from the top of a house into the street, is always cited in our books as an instance of homicide, which may be misadventure, manslaughter, or murder, according to the circumstances of the case.

§ 5. The offence of mortally stabbing another upon sudden provocation, not then having a weapon drawn, nor having first stricken

State Trials, vol. vi. p. 222. 3 Inst. p. 67. "the Event shall be coupled to the Cause."



at the party killing, is a peculiar species of manslaughter, which is punished as murder by a statute made in the first year of James the First, upon a special occasion: The offence (says Lord Raymond) consisted in the manner of doing it, because the Scots carried short daggers, and frequently, upon differences arising at table, stabbed others unprovided.

The particular grievance between the nations hath long expired; and the particular remedy provided for it ought not to have survived.

The ingenuity and benignity of the judges have gone hand in hand in the construction and mitigation of this statute; yet it hath proved fatal to many unfortunate persons, who have suffered, not merely because they had killed, but because they had adopted a mode

Of this the following solemn determination in the case of Page and Harwood is a curious instance. "Though in judgement of law every one present, and aiding, is a principal; yet in the construction of this statute, which is so penal, it shall be extended only to such as really and actually made the thrust; not to those who in construction of law only may be said to make it." Hale i. 468. Allen, 43. Sules, 86.

of killing, to which the law expresses a partial antipathy.

§ 6. The diffuse manner in which I have now considered the inferior instances of homicide, hath almost exhausted the subject; and it might perhaps be sufficient to add, that every remaining instance amounts to the crime of murder<sup>1</sup>, that crime at which our nature shudders,

Murder is the killing of another with malice aforethought, either expressed, or implied. No homicide, *publicly* committed, amounted to murder by the common law; for murder, according to the ancient definition of Bracton, *est occulta hominum extraneorum et notorum occiso manu hominum nequiter perpetrata*. This was remedied by stat. 13 Richard II. which gives a description of murder according to common understanding<sup>2</sup>.

The act then is not complete without the death of the party; but if the party should not die speedily after the blow, yet if he die within a year and a day, and if the wound

<sup>1</sup> Commentaries, B. iv. 194.

<sup>2</sup> Kel. p. 125.

be the ultimate, though not the immediate cause of death, it is murder".

And such murder is not confined to direct attacks upon life, but may be the consequence of indecisive acts, or wilful neglects, or cruelties, from which death was likely to ensue. This was the case of the woman who left her infant in an orchard covered only with leaves, in which condition it was struck by a kite, and died.

Express malice is that deliberate intention to take away the life of a fellow-creature, which is manifested by external circumstances, capable of proof. It has indeed been extended to that head of constructions which I have already mentioned. As when two or more meet together to do an unlawful act, the probable consequence of which may be blood-shed, and one of them kills a man;

It seems however to be a harsh resolution in Kelyng's Reports, p. 26, that "If one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do; yet if he die, it is murder, or manslaughter, according as the case is in the person who gave the wounds: because if the wounds had not been, the man had not died." Newgate Sessions, 14 Oct. 14 Car. II.

such



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such killing is adjudged to involve the whole company in the guilt of murder, they being presumed to have proceeded on a general and malicious resolution against all opposers. The fact, however, must appear to have been committed *strictly in prosecution of the purpose for which the party was assembled*; and this distinction probably governed the case of Lord Dacres, in which indeed there is an apparent hardship. The park-keeper was killed without his knowledge, and far out of his sight and hearing; yet in the eye of the law he was present, being at that instance engaged, though in a different part of the park, in the encouragement, protection, and support of the common enterprize. It is easy to illustrate this position by another instance: it hath been adjudged, that "If divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity, kills him; the rest are not concerned in the guilt of that act," because it hath no connection with the crime in contemplation,

<sup>o</sup> Hale's Hist. P. C. i. 534. Moore, 86. Foster, 354.  
<sup>p</sup> Kel. p. 112.

Implied

Implied malice is that inference which arises from the nature of the act, though no particular malice can be proved. As when a man suddenly kills another without any apparent provocation; when he gives poison to another without any known inducement; when he wilfully suffers a beast, not grossly mischievous, to wander abroad, and it kills a man. The last instance is certainly a most gross misdemeanour; and Lord Chief Justice Hale thinks it a murder, as by the Jewish law, and mentions a report of a person being actually executed thereon.

A peculiar protection is, in construction of law, given to ministers of justice executing the ordinary process; and also to private persons endeavouring in certain cases to arrest or imprison: the killing of such persons, though in the exertion of personal violence, is homicide committed in defiance of the justice of the kingdom, and is therefore deemed murder of malice prepense.

Exodus xxi. 29. "But if the ox were wont to push with his horn in time past, and it hath been testified to the owner, and he hath not kept him in, but that he hath killed a man or a woman, the ox shall be stoned, and his owner also shall be put to death."

And

And

And here it hath been much debated, how far acts of oppression towards individuals may authorize them, or the bye-standers in their behalf, to attempt a rescue; and how far the party, whose person or property is invaded under colour of law and justice, or others interposing in his defence, and committing homicide, may be thought to have acted on a provocation sufficient to acquit them of the guilt of murder.

The justification of resistance to magistracy, attended with such consequences, must principally depend on the circumstances of each particular case; and such resistance is generally founded rather in deliberate intention, than in the venial infirmity of passion.

Yet a worthy Judge seems to have made an unpleasing distinction on this subject, between the stability of government, and the private rights of the people. "Let us (says he) suppose the case of an upright and deserving man, universally beloved and esteemed, standing at the place of execution under a sentence of death, *manifestly unjust*.

Foster, p. 316.

"This



This is a case that may well rouse the indignation, and excite the compassion, of the wisest and best of men: but wise and good men know, that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise, all government would be unhinged.

The stating of the case now before us, supposes absolute certainty as to the injury, and excludes all possibility of popular misconception. It is difficult to persuade oneself, that in such a case the resistance of the bye-standers would be unjustifiable.

Drunkenness, voluntarily contracted, though it be a temporary frenzy, is no excuse for murder in the law of England; which proceeds in this instance on an idea, that one crime ought not to be privileged by another. I have some-where read, that a beautiful statue having killed a man by its fall, was by a

\* Socrates carried this idea to a great Extreme, when, doomed to death by an unjust sentence, he refused to stir from his prison, though the doors were opened to him.

In the story of Appius and Virginia, one cannot disapprove the insurrection of the Roman people against the Decemvirs:

solemn

solemn sentence, founded on a law of Draco, thrown into the sea. The Roman law shews great indulgence on this subject, "*per vim delapsis capitalis poena remittitur.*"

§ 7. The crime of taking away the life of another by false testimony, deliberately given, ought not to pass unnoticed. It is in its nature a most malignant species of assassination, contaminating with blood the sacred stream of justice, and fatal to the lives, properties, and honours of the innocent.

By the laws of Egypt, perjury in general was capital\*; for it was said to involve in itself the two greatest crimes, viz. impiety to the Gods, and violation of faith to man.

At Rome it was also a capital crime, but properly confined to those "*qui falsum testimonium dolo dixerint, quo quis publico judicio vel capitalis damnaretur.*"

\* ff. xlix. 16. 6.

\* Diodorus Siculus, l. i. c. 6.

\* Dig. l. xlviii. c. 8. § 1. 1. and under a similar regulation, magistrates were subjected to capital punishment in cases of bribery, if the bribe were received to put an innocent man to death. Dig. xlviii. 11. 7. 3.

In

In like manner, it is punished with death in France, and with good reason; for in France the person accused is not permitted to produce witnesses in his defence, and his doom depends solely on the veracity of those who give testimony on the part of the public.

This circumstance brings credit to the assertion of our ancient writers\*, that perjury was capitally punished by the common law. A milder doctrine however hath long prevailed; partly from an apprehension, that such severity might tend to intimidate witnesses, who would often be induced to stifle their testimony, if it must be given at the peril of their lives; partly in consideration of the nature of our trials, which furnish the accused with variety of resources; inasmuch as truth and mercy are admitted to combat falsehood and malevolence, and the whole examination is rather in the nature of a discussion between

\* L'Esprit des Loix, l. xxix. c. 11.

\* Myrror, c. 1. § 9. Brit. c. 5. Bracton, l. iii. c. 4. Contra, Mr. Justice Foster, p. 132.—In some instances, the tongue of the perjured person was cut out. "Aucuns sont punies par couper des langues, come seilloit estre de faux testimoignes." Myrror, c. 4. § de Peine.

\* Commentaries, B. iv. 197.



the parties, than of a prosecution against an undefended oppressed individual.

False testimony is at present punished capitally in Scotland; but this severity doth not appear to be warranted, either by ancient custom or by statute, but rather to have been assumed upon the indignation of the people against an offence so prejudicial to society<sup>b</sup>.

§. 8. There is another species of murder of most aggravated malignity, and known in our law by the name of petty treason; because it is a breach of that allegiance which the murderer oweth to the deceased, when the fact is committed<sup>c</sup>.

Petty

<sup>b</sup> By stat. 26 Geo. II. c. 23. "It is made a felony without benefit of clergy, wilfully to destroy, or cause or procure to be destroyed, any register book of marriage, or any part of such register book, *with intent to subject any person to any of the penalties of that statute.*" An offence certainly more venial than the crime of perjury in a capital accusation! But I have already observed, that arguments of analogy, in the framing of penal laws, lead to sanguinary consequences.

<sup>c</sup> In England, women (*from a regard to decency*, say our books) are burnt alive for the crimes both of high and petty treason. In Russia, for the murder of their husbands, they suffer a sort of death, less terrible perhaps in idea, but certainly more painful to sense.

"Les femmes, qu'on enterroit toutes vives jusques aux epaules, pour avoir tue leurs maris, vivoient plusieurs jours dans

Petty treason, in our law, differs widely from other instances of murder; in certain privileges given to the defendant; such are, the power of a peremptory challenge of thirty-five jurors, and the requisition of two witnesses to the indictment and at the trial.

It is certainly true, that *the credibility of a witness, or, in other words, the probability of the attested fact, decreases in proportion to the aggravated atrociousness of the charge.* Cicero was aware of this principle, and made a fine application of it to the crime of patricide:

“*Extent oportet expressa sceleris vestigia, ubi, quâ ratione, per quos, quo tempore, maleficium sit admissum. Quæ nisi multa et manifestæ sunt, profectò res tam scelestæ, tam atrox, tam nefaria credi non potest: penè dicam, respersas manus sanguine paterno judices videant, oportet, si tantum facinus, tam immane, tam*

dans cette dernière situation.” Voyage en Sibirie, d’Auroche.

“ Yet it is thought, as petty treason comprehends murder, that, if two witnesses cannot be produced at the trial, the evidence of one may be submitted to the jury, who may thereupon find the defendant guilty of the murder, and acquit him of the treason. Foster, p. 323. Contra, 2 Hawk. 258. § 144.

“ *acerbum*

“acerbum sint credituri. Magna est enim vis  
 “humanitatis; multum valet communio sangui-  
 “nis: reclamitat istiusmodi suspicionibus ipsa  
 “natura: portentum atque monstrum certissi-  
 “mum, esse aliquem humanæ specie et figuræ, qui  
 “tantum immanitate bestias vicerit, ut propter  
 “quos hanc suavissimam lucem aspexerit, eos in-  
 “dignissime luce privarit.”

I am sorry to add, that parricide is not comprehended within the class of petty treason, nor subjected by our laws to any degree of exemplary notice. Reiterated experience hath given a melancholy refutation to Solon’s idea, “that it is impossible to commit so unnatural a barbarity.”

It seems proper, at the conclusion of this chapter, to mention a rule established by Sir Matthew Hale, relative to trials in cases of murder; “I would never (says he) convict any person of murder, or manslaughter, unless the fact were proved to be done, or at least the body found.” He then mentions two extraordinary cases, which shew this rule to be founded both in humanity and

\* Orat. pro Sext. Rosc. Amerin. c. 22.



wisdom; and we find the same maxim in the Roman law: *Item illud sciendum est, nisi constet aliquem esse occisum, non haberi de familia questionem*.

§ 9. The proper judgement against deliberate murder, is death; and in the rigid infliction of this judgement both the safety and morality of mankind are greatly interested. It is the voice of nature, confirmed by the law of God, that "Whoso sheddeth man's blood, by man shall his blood be shed;" and therefore, saith the Mosaical law, "Ye shall take no satisfaction for the life of a murderer, which is guilty of death; but he shall surely be put to death: so ye shall not pollute the land wherein ye are."

[Dig. l. xix. c. 5. § 14.]

CHAP.

# OF PENAL LAW. 245

## CHAPTER XIX.

### *Of Duelling.*

§ 1. **T**HE law of England hath assigned the punishment of murderers to Duellists and their Seconds\*; and in this it is supported by the laws of Religion and Morality. But this crime, though prohibited

\* It is very certain, that, in cases of Duelling in cold blood, or when there hath been a sufficient interval, for the passions to subside, the Principal and his Second, if homicide should ensue, are, in our Law, both guilty of Murder. Some able writers have holden, that the Second of the person killed is equally guilty, in respect of that aid, and countenance, which he gives to the Principals in the execution of their mutual purpose; but it seems (says Serjeant Hawkins) too severe a construction to make a man by such reasoning the murderer of his friend, to whom he was so far from intending any mischief, that he was ready to hazard his own life in the quarrel. Hale, p. 443. Hawk. i. p. 82. Dalt. c. 93.

The reasoning faculties of men vary as much as their faces: it hath been impossible therefore for the law to fix any time in which the passions shall be supposed to become cool; this must depend on the circumstances of deliberation to be given in evidence; and in many cases it hath been adjudged, that death in consequence of an appointment and meeting a few hours subsequent to the provocation is murder. See Legg's case; Kelyng, 27.

ed by the legislature under pain of death and the lasting consequences of an Attainder, is unhappily enjoined by the prejudices of mankind, and the fallible voice of popular estimation; and when shame is the consequence of obedience to law, the sword of Justice loses its terrors. Hence the Duellist kills his friend, whom he loves<sup>a</sup>; and the Judge condemns the Duellist, whilst he scarcely knows how in his own heart to disapprove his behaviour.

It is in vain to say, that this unhappy custom might be destroyed by punishing the aggressor, who first gives the affront; for the affront is often indescribable.

The infliction of extreme penalties on the act without regard to its consequences might be more effectual; but is it not to be feared,

There is a degree of hardship in the case of John Barbot, who was executed at the Island of St. Christopher, A. D. 1753. State Trials, vol. x. p. 182. But I have not found any case of an actual execution in *England*, in consequence of a duel *fairly fought*. There were not however any suspicions of a contrary kind in the case of Major Oneby, who would certainly have been executed, if he had not killed himself the night before. See Lord Raymond, p. 1485.

<sup>a</sup> Spectator, N° 84. Rousseau, la nouv. Heloise, t. i.

that



that the propensity of our natures to revenge would substitute the more fatal, and more odious practice of assassination? I shall be answered perhaps, that the sword and the stiletto were equally unknown, both at Rome and at Athens; but it should be remembered, that softness and refinement of manners were also unknown there.

Of little avail is it to object, that true honour depends not on the prejudices of the people, but hath its source in the heart; that it is more courageous to resist the absurd tyranny of custom, than to submit to it; that the defence of honour is not placed in occasional appeals to the sword and pistol, but in a life of integrity and virtue; that, when a fencing-school is made the court of justice, there is

Gallantry, as well as Duelling, is of modern invention; and it is very observable, that they have been concomitants in their progress. The intercourse of the sexes hath been the school of manners: and there even seems reason to suspect that our fantastic notions of honour are derived from the influence of female sensibility. One of the courtiers of William the Third expressed this idea very naturally, when, being asked by his friends, why one of his established character for courage and good sense would answer the challenge of a coxcomb; he confessed, "that for his own-sex, he could safely trust their judgment: but how should he appear at night before the maids of Honour?" See Shaftesbury, Adv. to an Author.

no law but violence, no argument but murder; that reputation is not cleared by cutting the throat of the calumniator; that there is no affinity between the manner of justifying, and a real justification; that benevolence is the basis of every virtue; and that it is the frenzy of fashion which tempts us to decide petty animosities by the hazard of eternity. All these assertions may be true; but the most solid reasoning is received as mere declamation, when opposed to the impetuosity of passion, or the fear of shame.

## C H A P. XX.

*Of Suicide.*

*P* Roxima deinde tenent masti loca, qui sibi lethum  
 Infantes peperere manu, lucemque perosi  
 Projecere animas<sup>k</sup>.

The best argument of the ancient writers against suicide is to be found in Plato's

<sup>k</sup> Virgil, *Æn.* l. vi.

Phædo,

Phædo, in a part of the dialogue between Socrates and Cebes. The philosopher indeed had no occasion to exert his abilities on the opposite side of the question, for he lived in hourly expectation of the executioner. "*Ille tanquam cyneæ vox divini Hominis*<sup>1</sup>," had no effect on Cato, who is said to have given a repeated reading to these speculations on the very night that he destroyed himself. Robeck wrote a voluminous and dispassionate apology for suicide, and when he had finished his book, put a period to his own existence. Numerous also are the instances, credibly attested, of men, whose conduct in every other respect hath been blameless, who have quitted life, upon the supposed conviction of cool and deliberate reasoning. "When all the ties, say they, of sentiment and affection, which attach the heart to this world, are by a variety of misfortunes dissolved, or forced asunder, the idea is obvious; when existence becomes a burden, death is the resting-place of nature."

Such is the argument of those gloomy sophists, who lose sight of the final object of

<sup>1</sup> Cicero, de Oratore.



their existence; who forget, that they are not created merely to exist, to suffer, and to die; and are weak enough to place a few years of misery in competition with immortality.

Such men are deaf to the voice of God; it cannot be expected, that they will listen to the comparative insignificance of human edicts. Temporary considerations have no weight with those, to whom the prospect of eternity is become a subject of indifference.

The confiscation therefore of property, inflicted by many governments on the crime of Suicide, is ineffectual and absurd. It is cruel also and unjust thus to heap sufferings on the head of innocence, by punishing the child for the loss of its parent, or aggravating the distress of the widow, because she hath been deserted by her husband.

The ignominious burial of the self-murderer is not liable to such exceptions; *valeat, quantum valere potest*. Plutarch tells us, that the virgins of Miletum, being seized with an epidemic

epidemic inclination to hang themselves, persisted in that practice with great alacrity; till the magistrates ordered the bodies of all, who were found hanging, to be dragged naked by the same rope round all the streets of the city. He adds, that it proved a very effectual remedy<sup>m</sup>.

Tiberius is said to have given encouragement to criminals, to become their own executioners. *Damnati, publicatis bonis, sepultura prohibebantur: eorum, qui de se statuebant, humabantur corpora, manebant testamenta, pretium festinandi.*—Tacit. Annal. l. vi.

<sup>m</sup> “Le Parlement de Paris condamne les cadavres des homicides d’eux-mêmes, à être traînés sur une claie, conduits à la voirie, ensuite pendus par les pieds et leurs biens confisqués.” Code penal.

## CHAP. XXI.

*Of other Crimes relative to the Persons  
of Individuals.*

**I**NJURIES and abuses, which relate to the persons of private subjects, are properly liable to penal laws; for in their example and tendency, they are dangerous to the public morality, and subversive of the political rules of right.

§ 1. By the ancient law of England, and, I believe, by the cotemporary laws of all Europe, the offence of maiming was punished by the rule of retaliation, an eye for an eye, a tooth for a tooth\*. “*Mes, si la pleynte soit faite de femme qu’avera tollet a home ses membres, en tiel case perdra la femme la une meyn par judgement, come le membre dount ele avera trespasse.*” We find the same in-

\* Diodorus Siculus relates a curious case, which happened in consequence of a law made by Charondas to the same effect. L. xii. c. 17.



stitution in the law of the twelve tables, "*Si quis membrum ruperit, ni cum eo pacit, talio esto.*" The observations made on this subject by one of the disputants in Aulus Gellius are curious and decisive. "*Præter enim ulciscendi acerbiter ne procedere quoque exsecutio iusta talionis potest, quod enim per imprudentiam factum est, retaliari per imprudentiam debet. Sed si et prudens ruperit, nequaquam patietur altius se lædi, aut latius, quod cuiusmodi librâ atque mensura caveri possit, non reperio; quin etiam si quid plus erit, aliterve commissum, res fiet ridiculæ atrocitatis, ut contraria actio mutue talionis oriatur, et adolescat infinita quædam reciprocatio talionum.*"

This barbarous mode of punishment, with the pecuniary compensations which attended it, having gradually fallen into disuse, Mayhems became punishable by fines and imprisonment; and so continued till the 5th of

Rot. Claus. Anno 13 H. III. m. 9. "*Henricus Hall & A. uxor ejus capti sunt et detenti in prisonâ de Exilebester, eo quod reclusi fuerunt, quod ipsi absciderunt virilita Johannis monachi, quem idem Henricus apprehendit cum prædictâ A. uxore ejus.*"

H. IV.

H. IV. c. 5. which made it felony to cut out the tongue, or put out the eyes, of any of the king's subjects, of malice prepense. "The mischief (says Sir Edward Coke) before this statute was; that when one had been beaten, wounded, maimed, or robbed; the misdoers, to the end that the party grieved might not be able to accuse them, did cut out their tongues, or put out their eyes, pretending the same to be no felony."

But the great statute on this subject, at present in force, is the 22d and 23d of Charles II. c. 1. which enacts, "that any person, who, by lying in wait, shall slit the nose, or cut off or disable any limb or member of any subject of his majesty, with intent in so doing to maim or disfigure, shall suffer death without benefit of clergy."

I have specified this particular provision in favour of the nose, for the sake of an observation. The case of Sir John Coventry deserved great indignation; but lawgivers ought not, in consequence of a particular enormity, to neglect the uniform dispensation of justice. The

statute book is not the proper repository of historical facts<sup>1</sup>.

As to the general purport of the act; the offences described in it are certainly heinous; and the penalty, though in the extreme of severity, is perhaps not disproportionate to the audaciousness of the crime.

§ 2. "The crime of wilfully and maliciously shooting at a person" is also made capital, though neither death nor maim should ensue.

It is of dangerous consequence to make the attempt to commit a crime, and the actual perpetration of it, equally penal. An assault in any other manner, with intent either to maim or murder, is considered only as a misdemeanor; and it deserves observation, that the wording of this provision, though directed against an enormity of a local and very different nature, comprehends the case of duelling with pistols.

<sup>1</sup> See the preamble to the 9th Ann. c. 16. relative to the persons of privy counsellors.

<sup>2</sup> 9 Geo. I. c. 22.



Premeditated assassination is capital, punished by the law of France, though it should rest only in the intent, and not be followed by any actual homicide.

§ 3. The forcible abduction and marriage of women deserves, in all states, a severe animadversion; and it is made a capital felony in our law, if done for lucre; or if the woman have substance in money or lands, or be heir apparent to her ancestors. These hypothetical provisions are liable to exception; but it is unnecessary: for the marriage act hath at least had one good effect, in making this offence extremely difficult to be committed.

§ 4. The forcible taking, and the decoying by false pretences, any man, woman, or child, from their own country, and selling them into another, seems to be one of the greatest crimes below the degree of murder, that can be committed against individuals. By the Jewish, and by the Roman law, such offenders were capitally punishable.

\* Ordonnance criminelle de 1670, tit. xvi. art. 4.

† Exod. xxi. 16.—ff. x. xlviii. 15. 1. and—Cod. ad legem Fabianam de Plagiariis, l. ix. t. 20, l. 7. and c. 16.

It is remarkable, that in England, where the nature of our situation and commerce makes this crime easy to be committed; and where the freedom of our constitution makes it peculiarly offensive; it is not mentioned in any statute, but left as a mere misdemeanor at the common law.

§ 5. Assaults, Woundings, and false Imprisonments, may be prosecuted in our law both as public crimes, and private wrongs. For in these inferior offences against the person, it hath been thought reasonable, not only to assign those marks of public disapprobation, which, for the sake of example, are due to all disturbances, and oppressions of a public nature, but also to leave to the party aggrieved that private satisfaction, which is due to him for the mere civil injury.

On the conviction of such offences by indictment, the proportion of the punishment depending on the circumstances of the case is necessarily entrusted, under certain restrictions, to the discretion of the court. If therefore the prosecution appear reasonable, it is not unusual to recommend to the offender, before judgement, to make a pecuniary satisfaction

faction to the party injured: who thereupon releases his right to a civil action, and the punishment by the court is moderated accordingly.

This practice, which is founded in humanity to both parties, is exercised with the utmost caution, so as neither to lessen the efficacy of public example, nor to multiply violent prosecutions for the sake of private lucre. It is well observed however, that the exercise of such a power ought to be "confined to judges in the superior courts of record, and ought never to be allowed in local and inferior jurisdictions." Above all, it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by such means the rules of evidence are entirely subverted, the prosecutor becoming in effect a plaintiff, and being suffered to bear witness for himself.

§ 6. I should observe, that, by the 9th Anne, c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony with-

\* Commentaries, B. iv. 357.



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but the benefit of clergy. *It would be a good general rule, to give at first a temporary limited duration to all new laws, which are capitally penal; and particularly to those, which are made on the spur of the occasion.*

§ 7. It is with much reluctance, that I undertake the mention of certain other crimes relative to the person, which, in their nature and tendency, are very prejudicial to the well-being, morality, and safety of society.

The crimes, to which I allude, are founded in the abuse of that passion, on the due regulation of which depend the existence, and much of the happiness of mankind.

The offence of rape is secret in its kind, and generally confined to the knowledge of the party injured; whose testimony is therefore competent, because frequently the only adducible proof of the fact. The charge however is in most cases supported by the collateral, and concurrent testimony of time, place, and circumstances; and the mere

There is another law still existing relative to felonies against the king's council. 3 H. VII. c. 14.

affirmative oath of the woman is rarely thought sufficient to convict. The well-known words\* of Sir M. Hale on this subject are very deserving of attention. "It is the excellency of the trial by jury, that they are the triers of the credit of the witnesses, as well as of the truth of the fact: it is one thing, whether a witness be admissible to be heard; another thing, whether he is to be believed, when heard."—"It must be remembered, that this is an accusation easy to be made, and hard to be proved; but harder to be defended by the party accused, *be he never so innocent.* And we ought to be the more cautious, because the heinousness of the offence many times transporteth the judge and the jury with so much indignation, that they are over-hastily carried to the conviction of the person accused, by the confident testimony of sometimes false and malicious witnesses."

The same learned writer hath also said, "that this crime ought to be severely and impartially punished with death;" and

\* Hale, vol. i. p. 634.

we may allow it to be one of those unhappy instances, in which it is necessary to sacrifice the life of a fellow-creature to the security of good citizens, and the peace of society. But it must also be admitted, that it is a crime peculiarly liable to vary in the degree of its atrociousness, according to the circumstances of the case, and therefore peculiarly open to the divine prerogative of pardon.

This crime was a felony at the common law, and had a punishment (saith Sir E. Coke) "under such a condition, as no other felony had the like."

The offender was adjudged "*amittere oculos, quibus Virginem concupivit; amittere etiam testiculos, qui calorem stupri induxerunt.*" As good reasons might be given for cutting off the legs and arms of the offender, as for putting out his eyes. The idea of castration is more obvious, but liable to two objections;

1. 2 Inst. 180—See the Myrror, c. 4. § de Homicide. And by the laws of Alfred, "*Servus si servulam stupravit, Virga virilis ei præciditor.*"

2. "*Item sequitur gravis poena corporalis, sed sine amissione vitæ, vel membrorum, si raptus sit de concubina legitima, vel alia quantum faciente sine defectu personarum; hoc quidem debet rex tueri pro pace sua, et licet meretrix fuit antea, tum temporis non fuit, cum nequitia ejus reclamando consentire noluit.*" Bracton, l. ii.



it is pernicious to society from the example of barbarity, and; inconsistent with that decency which the law always ought to preserve.

The latter consideration should never be neglected. It was an instance of the wisdom of the Emperor Theodosius, that he abolished the infamous punishment of women taken in adultery, then used at Rome, by which they were prostituted in the public streets to all comers, a Bell ringing during the execution of the sentence.

In the ancient law of England, exclusive of the punishment inflicted on the ravisher, his horse, greyhound, and hawk, were also subjected to great corporal infamy. *Equus ejus ad dedecus suum dedecorabitur, cauda quam propius manibus possit, abscissa, eodem modo canis leporarius dedecorabitur, et acipiter ejus perdet beccum, ungues, et caudam.* but the woman, that was ravished, might prevent all the penalties, if, before judgement, she demanded the criminal for her husband. The Roman law was in the

And under Hen. VIII. those infamous women (he adds) Pufendorf, viii. 3. 27. Socrat. Hist. Eccl. l. v. c. 18. Stamford, 22. B. A. "the church whilst they lived." And the then prevailing powers (who were certainly famous)

same spirit; "*Raptoris aut maritimi  
in doli nuptias optat;*" upon which  
there arose what was thought a doubtful  
case; "*Una nocte quidam duas rapuit, altera  
mortem optat, altera nuptias.*" In the judge-  
ment of common sense the decision is evi-  
dent.

In the construction of this crime the  
Roman law made no distinction between  
seduction and force; "*Sive violentibus sive vo-  
lentibus tale facinus sit perpetratum.*" In mo-  
derate execution of the sentence.

The ancient Laws of England treated every species  
of Incontinence, with great severity—"Edmondus rex  
adulterium afflicti iussit instar homicidii." Leg. Edm. c. 4.  
"Canutus rex hominem ad alterum in exilium relegari  
iussit, hominem velum et aureas praerogative." Leg. Canu.  
c. 6, & 30. "*Vidua si se non legitime commiscebat xxs.  
amendabat. puella vero xs.*" Domelday, Tir. Centre.—It  
is says Fleta, lib. c. 5, the office of the Marshal, in time  
of peace, to exact from every common woman found about  
the court four pence on her first apprehension, and to forbid  
her the court. On the second, he is to oblige her by  
dishes to leave the court, and Terno, considerabitur quod  
amputetur illi tresoria et quod tondeatur; quarto, am-  
putetur illi superlabium.—Sir Edward Coke cites a re-  
cord, in which Edward the Third commands the Mayor  
of London to remove all such women from the neigh-  
bourhood of the Carmelite brethren in Fleet-street.  
And "under Hen. VIII. those infamous women (he adds)  
were not allowed christian burial when dead, nor the sines  
of the church whilst they lived." A. D. 1600, it was en-  
acted by the then prevailing powers (who were certainly ill

der nations, where the intercourse of the sexes is more promiscuous, this severity would be very extensive in its consequences. The English law hath made force necessary to the crime; and it was made felony without benefit of clergy in a female reign.

There was a degree of good sense in the punishment inflicted by the Athenian laws on the ravishers of unmarried women; "*Raptor virginis mille drachmis* (about 32 l. 6 s.) *multator; et virginem, quam viliavit, ducito.*" It

qualified for the rational and deliberate work of legislation) that "if any man shall from and after the four and twentieth day of June following have the carnal knowledge of the body of any virgin, unmarried woman, or widow, every such man so offending and confessing the same, or being thereof convicted, as aforesaid, shall for every such offence be committed to the common jail, without bail or mainprize, there to continue for the space of three months: and every such offence is hereby adjudged felony, and the person or persons so offending shall suffer death, as in case of felony without benefit of clergy." Scobell's Acts and Ordinances, p. 122.

By the same act, adultery, in the first instance, is made felony without benefit of clergy.

The law of Howel Dda on this subject was written in a milder spirit. "*Si quis concubuerit cum ancilla invito ejus domino, dabit domino ejus xii denarios pro qualibet vice, et cum illa amplius non concumbet.*" L. i. c. 1.

appears



appears however from a passage in Terence, that the latter part of the law was confined to Athenian citizens.

*D. de Stultis. In te tuus pateris me summas.*  
*Agere: His peccatum in virginem est tibi.* M. Scio.  
*D. Eho! Scis? et patere? M. Quidni patiar? D. Dic mihi,*  
*Non clamas? non insanis? M. Non, malim quidem.*  
*D. Puer natus est. M. Di bene vortant. D. Virgo nihil habet.*  
*M. Audisti? D. Et auccenda indotata est? M. Scilicet.*  
*D. Quid aliam facias? M. Domi erit. D. Prohi Divum fidem!*  
*Mertrix et materfamilias una in domo.*

§ 8. The above-mentioned caution of Sir Matthew Hale is peculiarly applicable to the proof of certain other crimes of a very detestable nature; the mere mention of which is disgraceful to the human species.

The facts to which I allude are at present felonious, and without benefit of clergy, by 5 Eliz. c. 17; in the construction of which statute, *agentes et consentientes pari pena plectantur*; and this agrees with the law of Mo-

Ter. Adelphi. IV. vii. 8. & 28.

*Siquid ego erga Te imprudens peccavi, aut natam tuam.*  
*Ut mihi ignoscas, eamque uxorem mihi des, ut leges jubent.*  
 Plaut. Aulul. IV. x. 62.

\* This act revived the 25 H. VIII. c. 6.

ses,

*Quid dormierit cum masculo pedita femine,*  
*utique operatus est nefas, leti mortis*  
*atur.*

It hath been suggested by some ingenious writers, that severe penalties affixed to the conviction of crimes, the discovery and proof of which may be easily evaded, are more likely to add fuel to the guilty flame, than to extinguish it.

The idea is plausible in theory, but does not appear to be well supported by experience.

It is a maxim (says Busbequius) among the Turks, seldom to make inquiries after secret criminals, being unwilling to seek occasion for scandal; the severity of their laws is directed against open breaches of the peace of society. To this may be added, that, in the histories of the Turks, we read accounts of Turkish seraglios without a woman within the walls.

Levit. xx. 13.

*Veteres penarum satis adversum impudicas in ipsa professi flagitii credebant.* Tacit, Annal. l. iii. c. 58.

The

The profligacy of the Athenians on this subject is well known; and the partial restrictions established by Solon certainly had no tendency to a forcible extirpation of it.

*Servus ingenium puerum, ne amato, neve affectator, quifecus facit, publice quinquaginta plagarum latus illi infliguntur.* It was an

obvious inference to the people, that the pursuit prohibited to slaves was proper only for citizens. Again, *Siquis liberum atque*

*genium puerum produxerit, dica ei scribitor, convictus morte multatur.* The seduction

of any other rank was not in any degree penal.

Corn. Nepos says of Alcibiades, *quod in eunte adolescentia amatus est a multis, more Græcorum;* and that *Laudi in Græciâ ducitur adolescentulis, quamplurimos habere amatores.*

The Edict of one of the later Emperors on this subject is delivered with great energy of expression: *Quid desideratur ubi sexus perat locum? ubi amor quæritur nec invenitur? ubi scelus est id, quod non proficit scire, ju-*

\* See Petit, Leg. Att.

*“bemus*



*"hemus insurgere leges, armari jura gladio ul-  
 "tore, ut exquisitis penis subdantur infames,  
 "qui sunt, vel qui futuri sunt, neci."*

§ 9. I ought to have observed, that the English law describes this offence as commisable "with Man or Beast;" under the latter part of the expression many persons have suffered death.

The unavoidable and general detestation of mankind will always be a strong barrier

Cod. ix. l. 9. 31. See also Nov. cxli. t. 24. "de his  
 "qui luxuriantur contra naturam." "Apud Gothos castra-  
 "bantur," Leg. 8 Westg. l. iii. 25. This crime is called  
 by the Myrror "une pèche mortelle encontre le roye le  
 ciel, que cry vengeance, et que plus est horrible, que por-  
 giser mere," p. 252. There is a very indelicate profusion  
 of learning on this subject in Mr. J. Fortescue Aland's  
 report of the case of Wiseman, who was tried and convicted  
*de hoc crimine cum puella*. A very learned person is there  
 said to have thought the peculiar circumstance of the case  
 a great aggravation of the crime; "For it seems (said his  
 "Lordship) a more direct affront to the Author of na-  
 "ture, and a more insolent expression of contempt to his  
 "wisdom, condemning the provision made by him, and  
 "defying both it and him." Fortescue's Rep. p. 13.

"Nefando non naturalis impudicitiae crimine qui dam-  
 natur, in rogam ardentem impositus flammis absumitur."  
*Jura Danica*, l. vi. c. 13.

"Messrs. Bruneau le noir, et Jean Diot convaincus de  
 ce crime ont été brûlés en place de Grève le Lundi, 9<sup>e</sup> Juil-  
 let, 1750." *Code pénal*, 238.

against

against so horrid a crime; but it may be a question, whether the public prosecution thereof be founded in wisdom. Some have thought it unsafe, and likely rather to solicit the attention, than to deter from the crime.

*Sapienter fecisse dicitur Solon cum de eo nihil sanxerit, quod antea commissum non erat, ne non tam prohibere, quam admonere videatur.*

*præterea videmus ea sæpe committi, quæ*

*sæpe vindicantur. Summâ prudentiâ altissimi*

*viri et rerum naturæ peritissimi, maluerunt,*

*velut incredibile et ultra audaciam positum,*

*scelus præterire, quam dum vindicant, ostendere posse fieri. Facinus aliquando præmon-*

*stravit: periculosum est ostendere civitati,*

*quanto plures mali sunt.*

## CHAP. XXII.

### *Of Crimes relative to Property.*

§ 1. **U**NDER this head, the offence of wilfully burning the house of another is considered as of the blackest ma-

*Cic. Orat. pro Sext. Rosci Amerino, c. 25.*

*Seneca de Clement. l. i. c. 23.*

lignity;

being fatal to the security of the innocent occupier, dangerous to the lives and possessions of persons even unknown; admitted in its consequences, and merely malicious in its motive.

By the ancient laws of England it was a felony, and one of those capital offences for which no ransom was allowed; and Briton tells us, that persons convicted thereof were burnt to death: probably under the idea of retaliation, or at least to make the punishment favour in some degree of the crime. Such whimsical connections have frequently influenced the minds of Lawgivers. It might, for instance, be difficult to conceive, why the 22 H. VIII. c. 9, should direct the crime of wilful poisoning to be punished by boiling to death, were we not informed by the preamble, that John Roose, a cook, had been lately convicted of throwing poison into a

*I have given a literal transcript of this clause in Let. Conti, l. 6. as a strong instance of the absurdity of the law. Illegit que ille soient punies per mesme le chose dont ils pecherent. Brit. fol. 16.*

The same statute forced the name of high treason upon the crime of poisoning. And in 33 H. VIII. Margaret Davy, a young woman, was attainted thereof for poisoning her mistress. And some others were also boiled to death in Smithfield, on the 17th day of March in the same year.

3 Inst.

large



large pot of broth prepared for the bishop of Rochester's family, and for the poor of the parish; and the said John Roope was, by a retrospective clause of the same statute, ordered to be boiled, perhaps, in his own kettle. But I return to the description of Arson, which is given by the Myrrour in the following extensive terms: *Ardaursoun, que uelait d'incendier, uilley, maison, home, maison bestier, son antree, chatels, de leur felony, en temps de place, pun baine et vengeance.* In subsequent ages it underwent various alterations, both in its definition and punishment; and at length by the 9 Geo. II. c. 22, made perpetual by 3 Geo. III. c. 42, it was, with many other offences, made felony without benefit of clergy, to: set fire to any house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood." I have given a literal transcript of this clause, as a strong instance of the vague, unfeeling, undistinguishing carelessness with which penal laws are composed, even in the most po-

I have given a literal transcript of this clause, as a strong instance of the vague, unfeeling, undistinguishing carelessness with which penal laws are composed, even in the most po-

Observations on the Ancient Statutes, p. 406.  
Myrrour, c. 98.  
in which field, on the 17th day of March in the same year.  
her mistress. And some others were pointed out.  
Dav. a young woman was hanged for poisoning. And in 33 H. III. Margaret

lished times. The penalty should in all cases; if possible, bear some proportion to the malice and mischief of the offence; but every idea of proportion is obliterated, when the same degree of guilt and punishment is assigned to the incendiary of a populous town, and to the destroyer of a small heap of dried grass.

The same severity is shewn, by the above-mentioned act, to all persons "who shall cut down, or *otherwise* destroy, any trees planted in any avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit;" though, by a former act, it continues only a clergyable felony, to set on fire any wood, underwood, or coppice. And by the 10th Geo. II. c. 23. persons maliciously setting on fire any mine, pit, or delf of coal, are made guilty of felony without benefit of clergy.

§ 2. "He that by night breaketh and entereth into a mansion house *with intent to commit a felony*," is deemed by the laws of

Co. 63. And therefore an indictment for breaking into the house of A. B. with intent *ad verberandum ipsum* A. B. is no burglary, because it is no felonious intent.

But

of England to commit burglary, and is, in the degree of his offence, the next object of inquiry.

Exclusive then of the permission given by our law to the alarmed inhabitant to kill his assailant, the sword of justice is also drawn against such assailant, and punisheth him with death, in case he should, by superior strength, or otherwise, escape alive from the execution of his purpose; and not only the Principal is made guilty of felony, without benefit of clergy, but also the Accessary before the fact.

The atrociousness of this crime consists chiefly in the terrors brought upon those who are found asleep and defenceless; and are deprived of that security in which they have a natural confidence.

For this reason the indictment must charge the house to have been a mansion-house at

But the opening of a door by a servant in the night time to come into his master's chamber, with intent to kill him, was by all the judges agreed to be burglary. Kel. p. 67.

It was in like manner, one of the Laws of the twelve tables, "*Si noctu furtum fit, jure caesus est.*"

T

the



the time of the burglary, yet it may be doubted, whether our law hath not in some degree departed from this idea, in holding that, where the owner quitteth his house *animo revertendi*, it may still be considered as his mansion-house, though no person be left in it, nor found there at the time of the fact committed. There must be both an actual breaking and an entry to complete the crime. And here also it should be observed, that Sir M. Hale seems to speak with an inadvertence, and latitude, very unusual to his temper in cases capital, when he says, that if a hole be made in the house one night, with intent to commit a felony, and the same breakers enter the next night through the same, they are burglars: "for the breaking, and entering, were both nocturnal, though not the same night; and it shall be supposed, that they brake and entered on the night when they entered, which

\* Comment. B. iv. p. 225. and Foster, 77. who specifies the long vacations of lawyers, and the summers of citizens, as instances of such quitting *animo revertendi*. The breaking in such case (saith Sir Matthew Hale) is burglary, and the indictment shall suppose it domus mansionalis. Hale, P. C. vol. i. p. 556.

for the breaking makes not the burglary,  
until the entry."

I am perhaps mistaken in thinking there is  
a degree of severity in this opinion; for it  
certainly hath not been the inclination either  
of Sir M. Hale, or of those who have fol-  
lowed him, to suppose any thing that ought  
not to be supposed, against a person under a  
capital accusation. Yet it should seem, that  
in the interval between the breaking and the  
entry, it is the duty of the occupier rather to  
repair the damage, than to leave it a tempta-  
tion to further attacks: and consistently with  
this it hath been holden, that if a person  
leaves his doors or his windows open, it is his  
own folly and negligence; and, if a man en-  
ters therein, it is no burglary.

Opening the casement, unlatching the  
door, picking the lock, gaining admission  
by false pretences, going down the chimney",  
which

Commentaries, B. iv. p. 226. In the trial of a prisoner at Cambridge, Sir M. Hale  
was doubtful whether this was burglary, and so were  
some others; but upon examination it appeared, that in  
his creeping down, some of the bricks of the chimney were  
loosened, and fell down into the room, which (says he) put it

which is as much closed as the nature of things will permit, are all severally Acts, which, in construction of law, amount to an actual breaking.

The entry may be previous to the breaking; for, by Stat. 12 Ann. c. 9. if a person enters into, or is within, the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, and shall in the night break out of the same, this is declared to be a burglary.

It is holden, that, to put a hand or a hook in at the window, to draw out goods, is a burglarious entry. And this is another instance

out of question, and direction was given to find it burglary. Vol. i. p. 552.

It would not be easy for any man, whose understanding hath not the advantage of a professional education, to conceive how the nature of the crime should be varied by so trivial an accident. Such deviations of sound sense into sophistry are too often the consequences of legal reasoning.

See the case of Gibbons, as reported by one of the judges who tried him. "It appeared in evidence, that the prisoner in the night-time cut a hole in the window-shutters of the prosecutor's shop, which was no part of his dwelling-house, and, putting his hand through the hole, took out watches, and other things, which hung in the shop within his reach; but no entry was proved, otherwise



## OF PENAL LAW. 277

stance in which the construction seems to have exceeded the true idea of the offence.

I have expressed the more anxiety on this subject of burglary, because the selfish sensibilities of mankind may be too apt to excite an incautious indignation against the persons accused thereof, and because the lists of capital executions shew it in fact to be peculiarly fatal to Englishmen.

If the existence of those who are convicted of this offence be really dangerous to the safety of society, it is certainly both justifiable and proper to punish them with death; but this criterion of severity ought most strictly to be regarded.

It deserves observation, that the punishment of breaking on the wheel, as practised in France, was first introduced and applied against this offence by Francis the First, A.D.

1534, in the following words: "*Tous ceux qui auront été dûment atteints et convaincus*

than by putting his hand through the hole. This was Holden to be burglary, and the prisoner was convicted." Foster, p. 108.

" par Justice des dits délits, crimes et máléfices,  
 " seront punis en la maniere qui s'en suit, c'est  
 " à sçavoir les bras leur seront brisés, et rom-  
 " pus en deux endroits, tant haut que bas, avec  
 " les reins, jambes et cuisses, et mis sur une roue  
 " haute, plantée et élevée, la visage contre le ciel,  
 " où ils demeureront vivans, pour y faire pen-  
 " tence tant et si longuement qu'il plaira à notre  
 " seigneur les y laisser; et morts, jusqu'à ce qu'il  
 " en soit ordonné par Justice: afin de donner  
 " crainte, terreur, et exemple, à tous autres de  
 " n'échoir ni tomber en tels inconveniens.

This punishment is applied by the same  
 edict to highway robberies; and the same  
 form of words is constantly used at this day.

Though burglary may be committed with-  
 out any abduction of the property of others,  
 either intended or completed; yet in general,  
 so audacious a breach of the peace of society  
 is commenced *causâ lucri*, and consequently  
 attended by theft; in which case it is a mere  
 aggravated species of larceny.

Code penal, p. 101

§ 1. Larceny

§ 3. Larceny, when considered as a general term, is the felonious taking and carrying away of the personal goods of another.

The felonious intent cannot be presumed from the wrongful possession: it must result from the evidence given; that the taking was committed *animo furandi*: "I would never," (says Sir M. Hale) "convict any person for stealing the goods *cujusdam ignoti*, merely because he would not give an account how he came by them: unless there were due proof made that a felony was committed of these goods." *Tutus semper est errare ex parte Misericordiae, quam ex parte Justitiae.*

This worthy Judge, though unfortunate in cases of witchcraft, was in every instance peculiarly anxious, that persons really innocent might not be entangled under those presumptions, which many times carry great probability of guilt.

*Contrahit ille rei alienae fraudulenter, cum animo furandi, invito ejus domino cujus res illa fuerit.* Bracton, l. iii. 150. Fleta, l. i. 36. Hale, Hist. P. C. ii. 290.

\* For it is no felony by our law, if A find the purse of B in the highway, and take it and carry it away, and this with all the circumstances that may prove it to be done *animo furandi*, as denying it, or secreting it, &c. But by the Swedish law it is felony.



If the felonious intent should be clearly proved, still it will not amount to a felonious taking; unless it should appear, that the possession was gained without the consent of the owner.

It may at first view appear, that this distinction hath many exceptions in the law of England; as in the cases of servants embezzling their masters goods to the value of forty shillings<sup>b</sup>; of persons having the custody of the king's ammunition or habiliments of war, and embezzling the same<sup>c</sup>; of a guest robbing his inn or tavern of a piece of plate set before him<sup>d</sup>; of a lodger running away with furniture from his lodgings<sup>e</sup>; who are all severally punishable, as felons guilty of larceny. But it should be observed, that, in all such instances, the taking is actual; the

<sup>b</sup> By 21 H. VIII. c. 7. See also 33 H. VI. c. 7. which is still in existence, and inflicts an attainder of felony on the servant's default of appearance to answer to the master's executors in a civil suit.  
<sup>c</sup> 34 Eliz. c. 4. & 22 C. II. c. 5. which takes away the benefit of clergy from this offence, so far as it relates to naval stores. See also 1 Geo. I. c. 25.

<sup>d</sup> Hale, H. P. Coverts Rep. 506. Hawk. P. C. vol. i. p. 90.

<sup>e</sup> Stat. 3 & 4 W. & M. c. 9.

offender having only the liberty of use, and not the possession, by delivery,

Very different is the offence of A who rides away with a horse, which is lent to him by B; or of the Carrier, who secretes, and converts to his own use, the pack, or parcel, which is delivered to him. *The property here is severed from the possession;* and such persons are guilty only of the violation of a civil trust, and are punishable accordingly. Yet it hath been said by Sir E. Coke, and adopted by other writers, that, if the carrier openeth the bale of goods, and taketh *only a part* thereof, it is so manifest an evidence of the *animus furandi*, that it amounts to larceny.

I venture to use this expression, though the very learned Observer on the Ancient Statutes hath expressed a doubt, whether any reasonable line of distinction can be drawn between the cases here placed in Opposition. Obs. P. 371.

The possessory property of the carrier, in the goods delivered to him, is such, that he may maintain either an action of trespass, or indictment, as for his own goods, according to the circumstances of the case, against any one that taketh them from him. See Kelo 39.

3 Inst. 107. Comment. B. iv. 230.

— ὅτον πλέον ἡμῶν πάντῃ

It

It must be confessed, that, by the civil law, such breaches of trust, amounted in general to larceny. "*Si creditor pignore, sine is, apud quem est deposita, ea re utatur; sine is, qui rem utendam accepit, in alium usum eam transferat, quam cujus gratia ei data est; furtum commississe videtur.*"

There must be an abduction or carrying away; but a bare removal of things taken, though immediately interrupted by detection or apprehension, satisfieth this part of the definition,

It would lead me into an endless intricacy of discussion, were I to enter upon the detail of the several species of property, which come under the idea of the personal goods of another.

No larceny could be committed at the common law on chattels real, or things adhering to the freehold. This narrowness was founded rather on the prejudices of legal language, than on the conclusions of reason; and hath been remedied by various statutes.

The stealing of writings, relating to a real estate,



estate, still continues only a trespass<sup>1</sup>; but in general, the law on this point hath run into the opposite extreme of severity; and many things are become objects of larceny, which ought never to have been considered in that predicament.

It may be a sufficient proof of this last assertion, that the stealing by night of any trees, or of any roots, shrubs, or plants, to the value of five shillings, is by 6 Geo. III. c. 36, made felony in the principals, aiders, and abettors, and in the purchasers thereof, knowing the same to be stolen. There is another milder act, c. 48, relative to the stealing of timber trees, shrubs, &c. by day or by night. It is undoubtedly true, that *mild punishments are the best safeguards against such delinquencies.*

Bonds, bills, notes, &c. are, by stat. 2 Geo. II. c. 25, and very properly, considered, with respect to larceny, of the same value as the money, which they represent.

<sup>1</sup> See the case of the King against Webber. Trin. 13 G. II. in B. R. Stra. 1133. It was found by the special verdict, that the defendant had stolen a commission to settle boundaries, and also another parchment relative thereto, each value one penny. The question was fully argued; and it was determined, not to be a felony.

I have

I have heretofore occasionally cited many of our very harsh provisions relative to game. Larceny may also be committed of all valuable and domestic animals, as horses, oxen, sheep, hens, geese, &c. and of all animals *feræ naturæ*, proper for food, and known so as to be reclaimed.

It is enacted by statute 37 Ed. III. c. 19, "That if any person findeth any hawk, that is lost of his Lords, he shall forthwith bring it to the Sheriff of the county, who shall make proclamation; and that if any steal any hawk, and the same carry away, it shall be done of him as of a thief, that stealeth a horse or other thing." The concealing and carrying away is adjudged a stealing by this act. "In respect, saith Sir E. Coke, of the noble and generous nature and courage of falcons, serving *ob vitæ solatium* of princes, and of nobler and generous persons, to make them fitter for great employments."

In judgement of law, a man may, under certain circumstances, be said to have taken the goods of another, though he himself hath

\* Stat. 1 Edw. VI. c. 12. 2 and 3 Edw. VI. c. 33.

31 Eliz. c. 1.

Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34.

m 3 Inst. p. 109.

the general property in the goods taken. A delivereth goods to B, to keep for him, and then stealeth them, with intent to charge B with the value of them. Or, A. having delivered money to his servant to carry to some distant place, disguiseth himself, and robbeth the servant on the road, with intent to charge the Hundred. Both these cases are larceny in A: "For the money and goods are taken from those, who have a special temporary property in them, with a wicked and fraudulent intention."

§ 4. I have now given the general description of larceny, and am next to consider its different species or degrees of enormity.

Of burglarious larceny I have already spoken; the next in degree is Robbery, or "the open and violent taking of money or goods from the person of another, by force, or intimidation."

If the thief, finding the thing taken of little value, should return it; or if, after taking it, he should drop it through fear or by accident; still it is a robbery: for the

Foster, p. 124. Hale, vol. i. p. 513.

outrage



outrage offered to the rights of society, doth not vary in its nature, because ineffectual in its consequences.

A. taking of the goods of another in his presence only, as in the case of taking parcels out of a waggon, amounts to taking from the person, if done by putting him in fear; and "the law, in odium spoliatoris, will pre-sume fear, where there appeareth to be a sufficient ground for it;" requiring only, that the fact be attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property, for the safety of his person.

The benefit of Clergy is taken from this species of larceny, wheresoever committed, by stat. 3 & 4 W. & M. c. 9; and the value of the thing taken is immaterial. An attempt to commit this offence is, by stat. 7 Geo. II. c. 21, made a felony, transportable for seven years.

This crime certainly is a very audacious violation of the social compact, and proper to

\* Foster, p. 129.

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be severely punished by the laws of society; yet it may be doubted, whether it be of that heinous kind, which requires the *ultimum supplicium*; particularly when not aggravated by personal injuries to the party robbed. We have many instances of a peculiar generosity in the nature of English robbers; but it deserves consideration, whether it be not dangerous to society, to leave so little distinction between the punishment of simple robbery, and robbery perpetrated with murder <sup>p</sup>.

§ 5. It cannot be too strongly inculcated, that capital punishments, when unnecessary, are inhuman, and immoral; an observation very applicable to the punishment, inflicted by our laws on the crimes, which I am next to mention.

Private larceny from the person, of any money or goods above the value of twelve-pence, is deprived of the benefit of clergy by

“ A la Chine les voleurs cruels sont coupés en morceaux, les autres non : cette difference fait que l'on y vole, mais que l'on n'y assassine pas.

En Moscovie, ou la peine des voleurs et celle des assassins sont les mêmes, on assassine toujours, les morts, y dit on, ne racontent rien.” L'Espr. des Loix, xvi. c. 6.

the

the 8th Eliz. c. 4<sup>th</sup>, "that the fraternity  
 "or brotherhood of cutpurfes and pick-  
 "pockets" (as they are described in the pre-  
 "amble) "may not continue to *live idle* by  
 "the secret spoil of good and true subjects."  
 A public and well-regulated work-house  
 would have been a more proper remedy for  
 this offence. "The punishment of robbery,  
 "not accompanied by violence, should" (says  
 Beccaria) "be pecuniary; he, who endea-  
 "vours to enrich himself by the property  
 "of others, should be deprived of part of  
 "his own. But this crime, alas! is com-  
 "monly the effect of misery and despair;  
 "the crime of that unhappy part of man-  
 "kind, to whom the right of exclusive  
 "property hath left but a bare existence." It  
 would be absurd then to extort pecuniary  
 satisfaction from those, who are already  
 struggling in the extremity of want; but there  
 would be no absurdity in the infliction of  
 temporary imprisonments, with compulsion  
 to labour; a mode of punishment, which,  
 by inducing a habit of industry, and by

<sup>a</sup> The reason assigned by L. C. J. Kelyng for the  
 framing of this statute is not satisfactory. See Kel. p. 79.



the effects of that habit, would be equally beneficial to the criminal and the public.

§ 6. Larceny from the house, whether privily committed without violence, or openly in the day time, and therefore in neither case amounting to burglary, is, nevertheless, by the laws of England made capitally penal in almost every instance; and this by a multiplicity of statutes, so complicated in their limitations, and so intricate in their distinctions, that it would be painful, on many accounts, to attempt the detail of them. It is a melancholy truth, but it may, without exaggeration, be asserted, that, exclusive of those who are obliged by their profession to be conversant in the niceties of the law, there are not ten subjects in England, who have any clear perception of the several sanguinary restrictions, to which, on this point, they are made liable.

A modern writer, whose Book is peculiarly calculated for the general benefit of mankind, hath, by a diligent collation of the statutes to which I allude, reduced this chaos to some degree of order. I shall transcribe from his account, that the benefit of clergy is now denied upon the following supposed aggravations

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tions of larceny: viz. "in all larcenies  
 "above the value of twelve-pence from a  
 "church, or from a dwelling-house, or booth,  
 "any person being therein: in all larcenies,  
 "to the value of five shillings, committed  
 "by breaking the dwelling-house, though  
 "no person be therein: in all larcenies to the  
 "value of forty shillings from a dwelling-  
 "house, or its out-houses, without breaking  
 "in, and whether any person be therein or  
 "no; and in all larcenies to the value of five  
 "shillings from any shop, warehouse, coach-  
 "house, or stable, whether the same be  
 "broken open or not, and whether any per-  
 "son be therein or no. In all these cases,  
 "whether happening by day or by night, the  
 "benefit of clergy is taken away from the  
 "offenders."

§ 7. These severities have, with great plau-  
 sibility, been ascribed to the increasing opu-  
 lence of the kingdom; and indeed there seems

\* Commentaries, B. iv. 220.

† Stat. 23 Hen. VIII. c. 1. 25 Hen. VIII. c. 3.  
 1 Edw. VI. c. 12. 5 and 6 Edw. VI. c. 9. 39 Eliz.  
 c. 15. 3 and 4 W. and M. c. 9. 10 and 11 W. III. c. 23.  
 12 Ann. c. 7.

‡ Observations on the Ancient Statutes, p. 375.

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sufficient reason to believe, that sanguinary laws are the probable consequence of national prosperity. Sensibility sleeps in the lap of luxury; and the legislator is contented to secure his own selfish enjoyments, by subjecting his fellow citizens to the miseries of a dungeon, and the horrors of an ignominious death. Still, however, he feels a tacit disapprobation of the laws, which he hath enacted; and even, when injured, hesitates to bring the offender to justice. He knows, that the punishment is disproportionate to the offence; or, at least, if humanity be obliterated by interest, he foresees, that the punishment cannot be inflicted without raising the indignation of society against the accuser. The delinquent therefore is discharged without prosecution; he repeats the crime, under the expectation of repeated mercy; he becomes gradually familiar with dishonesty; and, at length, falls a victim to that preposterous severity of the law, which hath so long been the subject of his mockery. It is a property inseparable from harsh laws, that they are neither regular, nor expeditious in their execution; consequently, that they flatter the hope of impunity, and, equally injurious to the society and to the criminal, tend to the



fatal multiplication both of crimes and of punishments.

Exclusive of the several larcenies which I have already described, and their respective penalties; it is, and hath been from the year 1109, the law of England, that in general all persons guilty of larceny above the value of twelve pence shall be hanged. "*Animadvertite autem in quantam asperitatem, ex rerum temporumque vicissitudine, lex antiqua abripitur. Quod enim olim XII vœnit denarius, hodie sæpe XX solid. imo XL, vel pluris est; nec vita hominis interea charior, sed abjectior.*" This well-grounded complaint was published by Sir Henry Spelman, above a century ago; during that long interval the grievance hath been gradually increasing, and still remains undressed.

But the error lies deeper. *Money, which in its nature is of fluctuating value, is in no case proper to be made the standard-measure of criminality.* When the punishment of the offender depends on the value of the thing stolen, the adjudication of the law is vague and uncertain. Mercy also is admitted under the shield of interpretation; the impulses of benevolence

Benevolence are opposed to the obligations of religion; and jurors are taught to trifle with their oaths, and to call such trifling "a kind of pious perjury."

In fact, upon trials of larcenies so limited, it is commonly found to be the chief anxiety both of judges and of jurors, to reduce the crime below its real predicament, by reducing the conviction below the value affixed by law. Such an anxiety is the natural consequence of laws, which, by an absurd distinction, make a trivial difference between two sums the criterion of a capital crime; and enact, that a penny more or less shall be equivalent to the life of a man.

In ancient times, larceny was punished in some cases with the loss of a thumb\*; in others with the pillory, and the loss of an ear: in others with demembration, by cutting off the hand or foot", but this only after repeated acts. At length, by our Saxon laws,

\* Corone, 434. 10 H. III. Briton, xxiv. 6.

" Laws of K. Ina, Lambard, l. xviii. *Si paganus sapius furti insimulatus sit, ei manus et pes præciditor.* This mode of punishment was also much used in the reign of Hen. II. Bened. Abb. p. 132. Hoveden, p. 549.

it was nominally, when of the value of twelve pence, punished with death; but the penalty was redeemable by pecuniary composition, which was called *capitis aestimatio*. By the laws of Ethelbert this composition was a threefold restoration, besides a fine to the king; and, if the thing were stolen from the king, the restoration was nine-fold; but by the 9th of Hen I. it was enacted; *ut si quis in furto vel latrocinio deprehensus fuisset, suspendetur; Sublata Weregildorum, id est pecuniaria redemptionis, lege.*"

§ 8. Forgery, which is defined to be the fraudulent making, or alteration, of a writing, with intent to prejudice the right of another, is also a crime against property.

It appears to have been a species of the *crimen falsi* among the Romans; but it is rarely mentioned by them, or in the laws of other ancient nations; and the reason is obvious.

The increase of modern riches, the invention of paper, the many complex securities, and representations of property, the institu-

\* Leg. Anglo-sax. p. 304. tion



tion of national funds, and rules of written evidence, have all contributed to render forgery a consideration of great extent and importance. The offender, by 5 Eliz. c. 14, is punished with forfeiture to the party aggrieved of double costs and damages; with standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; with forfeiture to the crown of the profits of his lands, and with perpetual imprisonment. *I have cited this statute, which extends only to certain forgeries therein described, merely as proper to be repealed.* At present, "the imitation of stamps, in order to defraud the Stamp-Office; the antedating of a deed of conveyance in order to over-reach a former deed; an alteration in the name and description of the premises conveyed, or in the sum of money secured by bond or other deed, or in the limitations of an estate intended to pass; all these acts, and others of the like nature, tending to establish a false and fraudulent title to property, whether in the name of a real or fictitious person, are forgeries: and there is hardly a case of this kind,

It is also a felony, without benefit of clergy, to make a false entry in a marriage register, to alter it when made; to forge or counterfeit such entry, or a marriage licence, or to aid and abet such forgery; to utter the same as true,

kind, possible to be conceived and described, which hath not, in the course of the present century, been made a capital crime. The statutes for that purpose are innumerable; for exclusive of many general provisions, it is become usual, upon the issuing of new bills of credit, lottery orders, army debentures, &c. to add a special clause of forgery relative to the subject then in question. Here, therefore, if any where, may be applied the observation, *Pluit super populum laqueos legum accumulatio*.\*

§ 9. There is also a great variety of injuries against private property, which are in no degree fraudulent, but merely malicious; under this head the crime of Arson, which is capitally punished, is of the blackest dye, because destructive both of life and property. It hath, however, been thought expedient by the English legislature, to extend the same degree of severity to many mischiefs of very inferior criminality. Such are the offences

knowing it to be counterfeit; or to destroy, or procure the destruction of, any register-book of marriages, or any part of such register-book, with intent to avoid any marriage. 26 Geo. 1. c. 33, § 16.

\* De Augm. Scient.

of persons destroying turnpike gates upon roads, or posts, rails, or other fence, or fences, belonging to such turnpike gates, or the sluices, flood-gates, or other works of navigable rivers; of persons cutting any hop-blinds growing in a plantation of hops; breaking down the head or mound of any fish-pond, whereby the fish are lost and destroyed<sup>a</sup>; *killing, maiming, or wounding any cattle*; such also is the offence of wilfully and maliciously tearing, spoiling, cutting, burning or defacing the garments or cloaths of any person or persons, which is in like manner made a felony, though within the benefit of clergy<sup>b</sup>. If the legislature had not given repeated and deliberate proofs of a different sentiment, the punishment of death would seem by no means applicable to delinquencies which are merely in the nature of civil trespasses,

The second Stat. made in the 12th year of Q. Ann. c. 18. is less liable to exception.

<sup>a</sup> Stat. 9 Geo. 1. c. 22.

<sup>b</sup> 6 Geo. 1. c. 23. which is intituled, "An act for the further preventing robbery, burglary, and other felonies, and for the more effectual transportation of felons." The clause relative to cloaths is to be found in the last section.



All persons making any hole in any vessel in distress, or stealing any pump of such vessel, or who shall wilfully do any thing tending to the immediate loss or destruction of such vessel, are thereby declared to be guilty of felony without benefit of clergy.

CHAP. XXIII.

*Of Crimes of positive Institution.*

§ **E**VERY wanton, causeless, or unnecessary act of authority exerted by the legislature over the people, is tyrannical, and unjustifiable; for every member of the state is of right entitled to the highest possible degree of liberty, which is consistent with the safety and well-being of that state.

With this observation I proceed to instances from which this part of my subject will receive its easiest and best illustration.

\* *Mens et animus, et consilium, et sententia civitatis posita est in legibus. Hoc fundamentum est libertatis quâ fruimur, hic fons æquitatis. Legum denique idcirco omnes servi sumus, ut liberi esse possimus. Cic. Orat. pro Cluent.*

## OF PENAL LAW. 299

In the year of Rome 671, L. Flaccus, being chosen Interrex, declared Sylla perpetual Dictator, ratified whatever he had done or should do by a special law, and empowered him to put any citizen to death, without accusation, hearing, or trial. On this law Cicero made the following comment, "*Omniū legum iniquissimam, dissimillimamque legis, eam esse arbitror: veruntamen habet excusationem, non enim videtur hominis lex esse, sed temporis*."

When Lepidus celebrated his triumph over Spain, he commanded the whole Roman people to rejoice upon pain of Death; "*Sacris et sepulchris dent omnes hanc diem; qui secus fecit inter proscriptos esto.*" This proclamation must be considered in the nature of a temporary Law, and, as such, was both absurd and tyrannical.

The Decemvirs authorized creditors to cut in pieces the bodies of their insolvent debtors. One would wish to persuade one's self, for the credit of humanity, that this was

<sup>1</sup> De Leg. Agrar. iii. c. 2.

only a figurative permission to divide the effects\*.

The Emperors, Arcadius and Honorius, forbade upon pain of death all applications in favour of the guilty. They little considered, how unworthily the hand of Power is employed, in closing the eyes of Justice against Mercy.

A Man was capitally punished at Athens, for having killed a sparrow, which, to escape the pursuit of a Hawk, had taken shelter in his bosom: And the Areopagites put a Boy to death, for having picked out the Eyes of a little bird. The former case was thought a proof of a mind incorrigibly depraved; in the latter "*non videntur aliud judicasse, quam id signum esse periculosissimæ mentis, et multis malo futuræ, si adolevisset*"; or, in the words of a more elegant writer, "*il ne s'agit point là d'une condamnation pour crime, mais d'un juge-*

\* Tab. III. l. vi. "If the debtor be insolvent to several creditors, let his body be cut in pieces on the third market-day. It may be cut into more or fewer pieces with impunity: Or, if his creditors consent to it, let him be sold to foreigners beyond the Tiber."

Quintil. Inst. l. v. c. 9.

\* L'Esprit des Loix, l. v. c. 19.



*ment de mœurs dans une republique fondée sur les mœurs.* Such might be the motive; but such motives are not of that urgent necessity, which can authorize a legislature to place the life of a man in competition with that of an insignificant bird. It must be confessed indeed, that, by the laws of England, the malicious killing or wounding of any cattle is at this day capitally punished<sup>a</sup>; but feverities so preposterous confound every idea of proportion between the enormity of crimes, and the extent of their punishments.

It is a Law at Venice, that those, who carry fire-arms about their persons, shall suffer death<sup>b</sup>. This law is founded in apparent utility; nevertheless it is contrary to the nature of things, to make the bare possession of the means of mischief equally penal with the most criminal use of those means. I have before observed, that it is high-treason by the law of England to have in possession

<sup>a</sup> 9 Geo. I. c. 22.

<sup>b</sup> Charondas lege cavit, ut si quis conciones cum ferro intrasset, continuo interficeretur. Interjecto deinde tempore, gladio accinctus, ex rure domum repetens, subito indicta concione, sicut erat in eam processit: ab eoque qui proxime constiterat, soluta a se legis sue monitus, Idem ego illam inquit sanciam, ac stricto confestim gladio seipsum transfigit. Valer. Max. vi. 5. Diod. Sic. xii. 19.

an instrument, or other tool, not of common use in any trade, but proper only for coining.

Fleta mentions an ancient English law, which commanded every person contracting marriage with a Jew to be burnt alive. The blood of a Christian family was supposed to be contaminated perhaps by such a contract; but it would be difficult to prove, that any human Tribunal had a right to insist on such an expiation†.

A law of the Visigoths† compelled the Jews to eat every thing dressed with pork, but would not permit them to taste the pork itself. In this we trace all the wanton cruelty, of despotic enthusiasm.

† In the Chapter "of Crimes relative to Religion," I ought not to have omitted Sir Edw. Coke's argument for the use of fire in cases of heresy. 3 Inst. 43. "As he, that is a Leper of his body, is to be removed from the society of men, lest he should infect them, by the King's writ *de leprosa amovenda*: so he, that hath *lepram animæ*, that is to be convicted of Heresy, shall be cut off, lest he should poison others, by the King's writ *de heretico comburenda*."

† L. xii. tit. ii. § 16.

§ 2. The

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§ 2. The pursuit of this subject might be amusing; but I return to the laws of England now in force, some of which I shall mention without any observations.

Every person shall forfeit his goods and chattels, lands and tenements, to the King, and shall be imprisoned during life, who shall be convicted of having acted as a broker, or agent, in any usurious contract, where more than ten *per cent.* was taken<sup>m</sup>; or, who shall obtain a patent for the monopoly of gun-powder<sup>n</sup>; or who, being a counsellor, or other officer in the courts, shall practise without having taken the new oaths of allegiance and supremacy, and without subscribing the declaration against popery<sup>o</sup>.

All persons shall be guilty of felony, who shall *assemble* armed to the number of three, for the purposes of smuggling<sup>p</sup>; or, who shall serve a foreign state, without taking the oath of allegiance<sup>q</sup>; or, who shall bring in to the realm Gally-half-pence<sup>r</sup>; or who shall

<sup>m</sup> 13 Eliz. c. 10.

<sup>n</sup> 16 Car. I. c. 21. and 1 Jac. II. c. 8.

<sup>o</sup> 7 and 8 W. III. c. 24.

<sup>p</sup> 1 Jac. I. c. 4. § 18.

<sup>q</sup> 9 Geo. II. c. 35. § 13.

<sup>r</sup> 3 H. V. c. 1.

transport



transport wool out of England, or who, being watermen, shall take a greater number of passengers than are allowed, *if any be drowned.*

It is felony without benefit of clergy, to remain one month in the realm, being an Egyptian; or to be found in the fellowship of Egyptians; and Sir M. Hale takes notice, that thirteen persons were executed for this offence in one assize at Bury. It is equally capital, if any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner<sup>1</sup>; or shall maliciously cut in pieces or destroy any manufacture of linen cloth or yarn, either when exposed to bleach, or dry<sup>2</sup>; or shall wander, being a mariner, without the testimonial of justices<sup>3</sup>; or shall knowingly receive, relieve, or maintain, Priests or Jesuits<sup>4</sup>; or shall, during the term of transportation to the

<sup>1</sup> 19 Geo. II. c. 31. § 9.

<sup>2</sup> In this case the criminality is founded on the hypothesis of a casual event; in like manner it hath been adjudged treason to break a prison, *if any person be in danger under an accusation of treason*, though the prison-breaker did not know that such person was imprisoned for any such offence. Hale's Hist. P. C. vol. i. 141.

<sup>3</sup> 12 Geo. I. c. 34.

<sup>4</sup> 39 Eliz. c. 13. § 4.

<sup>5</sup> 4 Geo. III. c. 37. § 16.

<sup>6</sup> 27 Eliz. c. 2. § 4.

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British colonies, voluntarily go into any part of the French or Spanish dominions<sup>a</sup>; or shall be found in disguise in the act of passing with prohibited or uncustomed goods; or shall forcibly hinder, obstruct, assault, oppose, or resist, any of the officers of the customs, or excise, in the seizure of any such goods<sup>b</sup>.

It would be easy to collect considerable additions to this dismal catalogue; but the instances already given form a sufficient foundation for the following remark.

§ 3. Positive laws are those, which do not flow from the general obligations of morality, and the general condition of human nature; but have their reason and utility, in reference to the *temporary* advantage of that particular community for which they are enacted. Every law therefore, which comes under this description, ought to have a limited duration; and should not be suffered to remain a burthen upon the people, when the grievance, for which it was framed, hath ceased, and is forgotten.

<sup>a</sup> 20 Geo. II. c. 46. § 1.

<sup>b</sup> 19 Geo. II. c. 34.

The accumulation of sanguinary laws is the worst distemper of a State. Let it not be supposed, that the extirpation of mankind is the chief object of legislation. *Nous lisons de quelques empereurs de Maroc, qui uniquement, pour faire parade de leur adresse, enlèvent d'un seul coup de sabre, en se remettant en selle, la tête de leur écuyer.*

## C H A P. XXIV.

*Of the Composition and Promulgation of Laws.*

§ I. **I**N the course of this inquiry, I have attempted to state the original contract of society, the institution of penal restrictions, and the different effects of different penalties upon the sentiments of mankind: the nature also of criminality, the several species of crimes, and the particular degree of correction, to which, morally and politically, each crime ought to be subjected, have in their turn been considered.



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But these are the ground-works only of the system of government; the promulgation and execution of penal laws are the superstructure.

Here then we discover new matter for examination; too multifarious indeed, and too important, to be brought within the compass of the present design. I shall confine my attention therefore to the outlines only of this part of my subject; still anxious to establish the rights of humanity upon the principles of reason and benevolence; principles, applicable only to the legislation of those happy communities, where the good of all is the great object of all; and which bear no reference, either to that unnatural mode of government, which is known by the name of Despotism; or to those abused Aristocracies, which seek the gratification of a few in the desolation of many. Passive obedience hath no principles. Man is not created to submit to the arbitrary caprice of creatures like himself: "It is necessary to make a bad subject, in order to form a good slave."

\* L'Esprit des Loix.

§ 2. On the promulgation of every new law, it should not escape the attention of the lawgiver, that *public virtue is the love of the laws*. For the love of the laws is followed by the love of our country, and is consequently productive both of rectitude of conduct, and purity of morals. Public virtue, thus defined, is the true end of government; but harsh and sanguinary laws have a tendency to check the attainment of this end; for they cannot be executed without raising the indignation of the sufferer, and the abhorrence of his fellow-citizens. Vague and useless laws have the same evil tendency; for it may with truth be affirmed, that public virtue bears a proportion to political freedom; and that political freedom decreases in proportion to the uncertainty and multiplicity of penal laws.

“*Nec verò solum, ut obtemperent homines obedientique magistratibus; sed etiam ut eos colant diligentque, præferibimus, ut Charondas in suis facit legibus.*” Cic. de Legibus, l. iii. c. 2.

The ignorance of the people also diminishes in proportion to the increased freedom of the government.

And therefore it rarely happens, that very flourishing States retain a great degree of liberty; for the laws necessarily bear a relation, not only to the principle and nature of the constitution, but to the opulence, extent, and populousness of the country.

§ 3. It

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§ 3. It is essential to political freedom, and consequently to public virtue, that no man be compellable to do any thing, to which the laws of society do not compel him; or to abstain from any thing which the laws have not prohibited. Hence results a general right to do with impunity any action, not prohibited by antecedent law; for every penalty must in its nature commence *in futuro*: *Moneat Lex oportet, priusquam feriat.*

When the Duchess of Norfolk was attainted by the parliament, for having known and concealed the vicious life of Catharine Howard before her marriage; she was attainted for a concealment, which, without the spirit of vaticination, she could not know to be criminal. Her conduct had been in itself innocent; her guilt was then, first created by the legislature; and she was in fact punished for having eyes, ears, and a grand-daughter. Retrospective laws are generally unjust.

§ 4. It is also essential to political freedom, that the mandates and prohibitions of law be

Stat. 33 H. VIII. c. 21.

11. 32

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not



not extended to any action, not immoral in its nature, nor prejudicial to the well-being of society in its consequences.

When the Russians resented the attempt of the Czar Peter to cut off their beards, their resentment did not arise from a belief, that Liberty consists in the privilege of being exempted from the razor; but they misconceived the attempt to be founded in the mere wantonness of power; and their reason, uncultivated as it was, informed them, that, in matters of indifference, unrestrained freedom is one of the indelible privileges of mankind.

When by Stat. Jac. I. it was made felony for any person infected with the plague, to go abroad or converse with company; it was impossible to object to a severity, which, though fatal to individuals, was essential to the general safety of the people. But when in the eighteenth century it is made a capital crime to cut down a cherry-tree in an orchard; the thinking part of mankind must listen to such a law with irreverence and horror: for they know that the evil to be prevented is

11 28 by

by no means adequate to the violence of the Preventive.

Under this head it may be observed, that laws very severe in their nature, but originally not inconsistent with sound policy, are sometimes suffered to retain their force, long after their subject-matter hath ceased to be of any consequence to the interests of society. Such, for instance, is that statute, under which it is at this day a capital offence, to give corn, cattle, or other consideration, to the Scots for protection. It would be easy to produce many other instances equally exceptionable. And this is the necessary consequence of having given an unlimited existence to laws made for the correction of present evils. In the promulgation of such laws it should be observed, that they are founded in the momentary exigencies of society, and resemble that necessity, which, in cases of extreme famine, obliges men to eat each other. They cease to eat men, in such cases, as soon as bread can be obtained.<sup>a</sup>

<sup>a</sup> Stat. 42 Eliz. c. 13.

<sup>b</sup> See the French Commentary on the M. Beccaria.

It is farther essential to political freedom, that the laws be clearly obvious to common understandings, and fully notified to the people.

Anciently the laws were composed in verse, which were frequently sung in public, that men might remember them. The laws of the twelve tables were so well known, that, in the time of Cicero, children learnt them by heart in the first rudiments of their education. At Athens the laws were written upon tables in large characters, and hung up in public places on the walls. The invention of printing, and the easy circulation of printed papers, have made these precautions unnecessary in our times; but, in England, the effectual promulgation of the laws is much retarded by the manner in which they are formed. It was well observed by Lord

Aristot. Probl. § 19. & Horat. Ars Poët. 395.

Fuit hæc sapientia quondam

Publica privatis secernere, sacra profanis;

Concubitu prohibere vago; dare jura maritis;

Oppida moliri; leges incidere ligno.

Sic honor et nomen divinis vatibus, atque

Carminibus venit.

Discebamus enim pueri duodecim tabulas, ut carmen necessarium, quas jam nemo discit." De Leg. ii. 23.

Bacon,



Bacon, that the mandatory clause ought always to be placed at the beginning of the statute; yet those tedious preambles, which seem to have been derived from the ancient method of passing laws by petition, are still retained, though frequently ill-connected with the subsequent parts of the law, to which they are prefixed. When the laws are imperfectly known, they are feared, not loved. For, when the people first learn the law by fatal experience, they feel as if the Judge was in effect the Legislator; and as if life and liberty were subjected to arbitrary controul: the idea of insecurity is spread through the whole society; and the sense of safety, in which political freedom is founded, ceases to exist. Upon the same principle, the same will be the consequences, where the law is imperfectly and indefinitely expressed. The stile therefore should be clear, and as concise as is consistent with clearness; general terms also should be particularly avoided, as liable to become the instruments of oppression. Under the act 14 Geo. II. c. 6. stealing sheep, "or other cattle," was made felony without benefit of clergy; but these general words,

"or other cattle," being considered as too vague to create a capital offence, the act was properly holden to extend only to sheep.

§ 6. It hath been said, that the dread of evil operates more forcibly on the mind, than the expectation of good<sup>1</sup>; and therefore, that the sanction of laws must consist rather in penalties, than rewards<sup>m</sup>. But it may be offered, perhaps, as a more obvious reason for the establishment of penalties, that obedience to the law is a matter of duty, demandable from the subject, and unnecessary to be purchased by the allurements of gifts and privileges. Be this as it may, every law must have both a directory and compulsory part<sup>n</sup>, and without the latter will be imperfect<sup>o</sup>. The wayward minds of the people must be deterred from disobedience by the frightful images of pain and infamy.

<sup>1</sup> Locke on Human Understanding, B. ii. c. 21.

<sup>m</sup> Pufendorff, B. i. c. 6. § 4.

<sup>n</sup> Which other writers express by the word "vindictory."

<sup>o</sup> "Inter leges quoque illa imperfecta esse dicitur, in qua nulla deviantibus poena sancitur." Macrobian. l. ii. c. 17.

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It is unsafe to leave the measure of corporal punishment indefinite; but when shame only is the penalty, a greater latitude of expression is admissible. If the penal system were good, shame would be the certain consequence of disobedience to law. The Valerian law was revived in the year of Rome 453, and was expressed in stronger terms than before: "*Siquis autem adversus ea fecisset, nihil ultra, quam improbe factum, adjecit: id (qui tum pudor hominum erat) visum, credo, vinculum satis validum legis.*" Diodorus Siculus<sup>1</sup> pretends to have preserved certain laws of Zaleucus, in which the punishment of infamy is implied in a manner still more indecisive.

"Let not a free woman, *unless she be drunk,*  
 "be attended by more than one servant.  
 "Let her not go forth from the city in the  
 "night, *unless when she goes to prostitute her-*  
 "*self to her Gallant.* Let her not wear rich  
 "ornaments, or garments interwoven with  
 "gold, *unless she be a courtesan.*"

<sup>1</sup> Liv. Hist. l. x. c. 9.

<sup>2</sup> Diod. Sic. l. xii. c. 20.





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## CHAPTER XXV.

### *Of the Execution of Penal Laws.*

§ 1. **S**OLON is recorded to have said, that he had accomplished his system of laws, by coupling justice together with strength; by which he meant to imply, that the legislative power would be of little avail without the associated and effectual exertion of the executive. This idea may be extended; and one may assert, without the imputation either of cruelty or presumption, that the strict execution of every unrepealed law is the part both of wisdom and of mercy.

It had better be said, "*perquam durum est, sed lex ita scripta est;*" than "*lex ita scripta est, sed non valebit.*" Cruel laws are suffered to exist, because they are rarely enforced: for the same reason they are disregarded by the people; and laws more cruel

\* Οὐκ εὖ τὴν καὶ Δίκην συναρμύσας. Plutarch. Vit. Solonis.

are

are made, because those already existing are found ineffectual". Thus it is, that errors of the most fatal tendency are accumulated through many centuries; a truth, of which the conduct of criminal prosecutions in this country is a striking example. The English courts of judicature have long been eminent for the extraordinary wisdom and probity of the Judges. Benevolence hath a natural prevalence in such characters; but benevolence ceases to be a virtue, when it induces them to forget that they are not authorized to interpret the penal laws; and that they are entrusted with the execution of them by a Legislature actually existing, and alone competent to such interpretation".

If Larceny, when amounting in common apprehension to the value of twelve-pence,

A state so circumstanced may be described in the words of Tacitus, "*Antehac flagitiis laborasse, nunc legibus*," Tacit. Annal. l. iii. c. 25.

This idea is very strongly inculcated in Diod. Sic. l. xii. c. 16. "Charondas illos, qui in criminalibus judiciis legis consilium, non verba spectant, compescuit; ne cavillationibus auctoritatem legum labefactarent. Nam legum latori cedere honestum, argutias vero alicujus civis prævalere omnino absurdum, existimabat. A legis igitur præscripto, licet male admodum scripta esset, ut nullo modo discederetur, vetuit: corrigendi autem potestatem fecit, si quâ correctione indigeret.

blood

had



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had regularly received the judgement of death according to law, a law so absurd would not now exist; and Pilfering, destined to a more adequate, but certain correction, would no longer be encouraged by the confidence of impunity. Many instances of a similar kind have occurred in the course of this work.

In England, says Montesquieu\*, the jurors determine, whether the person accused be guilty of the crime submitted to their inquiry; if he be declared guilty, the Judge pronounces the punishment inflicted by the law on that particular offence; and for this purpose, it is only necessary for him to open his eyes." The learned writer was only acquainted with the theory of English law.

§ 2. But let not these observations on the danger of impunity be misapplied; they relate merely to the strict conduct of tribunals in the course of prosecution and conviction; to that fixed, invariable administration of justice, which is best calculated to make the penal system respectable. God forbid, that I

\* L'Esprit des Loix, l. vi. c. 3.

should confound the duty of the judge, which is to be directed by the letter of the law, with that prerogative of pardon, which resides in the breast of the supreme magistrate; and which, when properly exerted, participates the best attribute of heaven! Yet it seems necessary to remark, that every disproportionate severity of the penal laws hath a tendency to familiarize the minds of princes to the exertion of this prerogative; and consequently to lead them in many cases to the abuse of it. When such instances happen, the rightful security of the people becomes a sacrifice to the sovereign. It hath been well said, that "Clemency is a virtue which ought rather to reside in the code of laws, than in the private judgement of any individual." Yet we must allow, that, even in the mildest systems of which human societies are capable, there will still exist a necessity of this discretionary power, founded in the possible circumstances of every conviction.

§ 3. *Interest reipublicæ, ne delicta sint impunita.* But let not this consideration be suffered to induce an intemperate zeal, either

## OF PENAL LAW.

in judges or prosecutors, to punish the person accused, because a crime hath been committed. If the proof be doubtful, let the wretch be left, if guilty, to be his own punisher; let him be left to the censure of that internal tribunal, whose judgement is incapable of corruption, and whose terrors cannot be evaded by cunning, or collusion.

It is a political truth, that, *when the laws are good, those, who deserve punishment, rarely escape the arm of Justice.*

“Cur tamen hos Tu  
Evassisse putes, quos diri conscia facti  
Mens habet attonitos, et furdo verberare cædit,  
Occultum quatiente animo tortore flagellum?  
Pœna autem vehemens, ac multo sævior illis,  
Quas aut Cæditius gravis invenit, aut Rhadamanthus,  
Nocte dieque suum gestare in pectore testem.”

The same idea is finely expressed by our own poet, who seems to have possessed the singular power of turning his genius to every train of ideas, of which the mind of man can be capable:

“Tremble, thou wretch  
That hast within thee undivulged crimes,  
Unwhipt of justice: hide thee, thou bloody hand;  
Thou perjur'd, and thou simular man of virtue,  
That art incestuous: Caitiff, to pieces shake,  
That under covert and convenient seeming  
Hast practis'd on man's life.”

\* Juv. Sat. xiii. ver. 193.



§ 4. The first step towards the punishment of offenders is their formal accusation. In all governments, which have any mixture of political freedom, this accusation should, as in England, be public. Private informers are the proper instruments only of despotic governments. Every idea of liberty and security is lost, when the ends of justice are suffered to be sought by such means. It is the part of wise and moderate Legislators, anxiously to preclude every possible avenue to false accusation and calumny.

§ 5. In

\* The first depositions before the Magistrate are generally taken in the face of the country; and the finding of the indictment by the Jury is strictly in the nature of the public accusation; for the names of the witnesses are indorsed on the Record, and so delivered into the Court, that they may be publicly examined, and confronted with the prisoner in the course of the trial.

And here I shall digress in some measure from my subject, to observe, that, though the accusation transmitted to the Court is afterwards to be solemnly tried and determined; yet grand jurors should remember always, that it is their duty to consider fully the weight and credibility of the evidence laid before them; and that they are not authorized to expose a fellow-citizen to the shame, expence, and danger of a public trial, upon the vague suggestion of a mere probability.

<sup>b</sup> Yet it may be doubted, whether a wise and good writer did not use a very exceptionable, and dangerous latitude of expression, when he said that the false accuser ought to suffer the same punishment to which the person

§ 5. In the process subsequent to the first accusation, some delays are beneficial; (when Beccaria said otherwise, he consulted his own heart, and forgot the imperfections of mankind;) they are beneficial, because a certain interval is necessary between the crime alleged and the trial, that popular prejudices may subside into sound reason; that judges may not be heated by the recent recollection of the fact; and that prosecutors may rather seek the ends of justice, than the gratification of revenge. The enormity of the crime in question should be the measure of this interval. When the fact charged is very atrocious in its nature, a proportionable delay is requisite; not only, that the first passion of the people against the offence may evaporate; but that a sufficient time may be given for the preparation of proof on the part of the Public, and justification on the part of the Accused. Reason and the rights of humanity demand, that the strength and strictness of proof be increased in proportion to the enormity of

person accused would have been exposed in case of conviction. "Ogni governo, e repubblicano, e monarchico, deve al calunniatore dare la pena, che toccherebbe all'accusato." Dei Delitti, e delle Pene, § 16.

An assertion, which, if reduced to practice, would prove a fatal check to all criminal prosecutions!

the crime in question. The more trivial delinquencies are less incredible in their nature, and less important in their consequences both to the Public and the Party; they are therefore proper for a more immediate discussion. But in neither case should the interval be so great as to destroy that promptitude of punishment, which is requisite to make the suffering of the offender the apparent consequence of his offence.

§ 6. I will not affirm that the same distinction should be our guide as to the infliction of punishment after trial and judgement. If the crime be of an inferior nature, it seems certain, that the punishment proportioned to it should be immediately inflicted. We ought in such cases to spare the corroding torment of expectation, which can neither tend to the private amendment of the criminal, nor be exemplary to his fellow-citizens; and to promote as much as possible that useful association of ideas, which may check the frailty of the people, by holding out the image of unavoidable and immediate punishment. *The impression of terror diminishes in proportion to the distance of the object.*

But



But how far it may be proper to allow a longer interval, when a capital judgement is the consequence of conviction, is a question, on which it is difficult to reconcile the language of political utility with that of religion. The immediate execution of the criminal may possibly give a more salutary shock to the sentiments of his fellow-citizens, than the same horrid spectacle can produce, when the circumstances of the crime are in some degree faded on the memory, and when compassion hath taken the place of indignation. Yet what are the feelings of a serious mind at the sight of a fellow-creature thus cut off,

"With all his crimes broad blown, as flush as May;  
"And, how his audit stands, who knows, save heaven;  
"But in our circumstance, and course of thought,  
"Tis heavy with him."

§ 7. There are certain possible contingencies relative to the criminal, which should in all governments be admitted as good reasons in stay of execution. Of this kind is the plea of insanity; in regard to which,

• Shakespeare, Hamlet.

the benevolence of the English law hath been already mentioned. The plea of pregnancy is entitled to a similar indulgence, though not admitted to operate so absolutely in our law, as in the law of Egypt<sup>a</sup>, and of ancient Rome<sup>c</sup>. "If a woman (say the writers on the English law) hath once had the benefit of this reprieve, and been delivered and afterward become pregnant again, she shall not be entitled to the benefit of a further respite for this cause." Such is the doctrine of our law, and use hath taught us to read it with tranquillity and indifference; though in truth no reason can be given as to the first reprieve, which will not apply equally to the second.

<sup>a</sup> The reasons for this indulgence are clearly and fully stated in Diod. Sicul. l. i. c. 77.

<sup>c</sup> ff. xlviii. 19. 8.

<sup>f</sup> "And when a woman commits high-treason, and is quick with child, she cannot upon her arraignment plead it, but she must either plead "Not Guilty," or confess the charge. She cannot alledge it in arrest of judgment, but judgement shall be given against her; and if it be found by an inquest of matrons, that she is quick with child, (for *privement enccint* will not serve) it shall arrest and respite execution till she be delivered; but she shall have the benefit of that but once, though she be again quick with child." Co. 3 Inst. p. 17.

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§ 8. By the laws of the Romans the Executioner was forbidden, not only to appear in the Forum, but even to have any habitation in the City; and this was enacted, that the minds of the people might not be familiarized to the Idea of capital executions. Upon the same principle, it was not unusual to put the Malefactor to death in a secret dungeon, which was called *Tullianum*. It seems more adviseable however, on many accounts, that the punishment of death should in every instance be publicly inflicted; and it is a certain proof of some defect in the mode of infliction, when it ceases to be considered as the most solemn and affecting scene that can be exhibited.

*Carnificem non modo foro, sed etiam celo hoc ac spiritu, censoriae leges, atque urbis domicilio carere voluerunt." Cic. Orat. pro Rab. c. 5.*

CHAP.



## CHAP. XXVI.

*Of the Importance of this Subject.*

IT cannot have escaped the notice of my readers, that the ideas, which in the course of this inquiry I have endeavoured to establish as principles of penal law, have not been stated as abstract propositions; but rather as argumentative inferences, interwoven with, and to be collected from, observations on the penal systems of different governments. My attention hath at the same time been most particularly turned to the English code of laws; and many melancholy instances have concurred to shew that the reformation of that code is become an important and almost necessary work. I know, that many will conceive such a reformation to be impracticable; I know, that the minds of some will startle at the idea of innovations; I know, that others will shrink from the supposed difficulty:—Yet I am convinced, that

that the undertaking is neither impracticable, unsafe, nor difficult <sup>b</sup>.

Under this conviction it hath been my object, by frequent appeals to reason and benevolence, to engage those sensible and good minds, which are ever ready to sympathize with him who pleads the cause of humanity. To excite the attention of that more nume-

<sup>a</sup> The British Constitution is the pride of every Briton: to secure, to fortify, to perpetuate that excellent system of government, is the business of every Briton. It may be pardonable therefore in me to point out, what I conceive to be the best method of accomplishing the reformation in question; leaving the execution of that method, or the adoption of a better plan, to those who lie under the more immediate engagements both of interest and duty.

The learned Observer on the Ancient Statutes was certainly well founded in suggesting that a reformation of the English Law can never be effectually carried on, without the assistance of able Lawyers, not members of the Legislature. With such assistance, it might perhaps be easy to frame separate declaratory statutes relative to each class of crimes, comprehending all the descriptions and degrees of each crime, with their proportionate punishments. Every such declaratory statute should be attended by a supplemental Bill, repealing all prior provisions relative to the class of crimes in that statute contained. It seems superfluous to point out the many collateral good effects, which might arise from this method of seeking the end proposed.

The repeal of particular statutes, without such preparatory caution, will be found a mere palliative remedy; which may tend indeed to abate the symptoms of the disease, but from which a radical cure cannot be expected.

rous class of men, who are distracted by the cares, heated by the action, or dissipated by the pleasures of the world, may be wished, but is not to be expected: though nothing is more certain than that the subject of these enquiries deserves the attention of every man amongst us. "For no rank, no elevation, in life, no conduct how circumspect soever, ought to induce any reasonable man to conclude, that the penal system doth not, nor possibly can concern him." A very slight reflection, on the numberless unforeseen events which a day may bring forth, will be sufficient to shew that we are all liable to the imputation of guilt; and consequently all interested, not only in the protection of innocence, but in the assignment to every particular offence, of the smallest punishment compatible with the safety of society.

It must ever happen, that many private members of the state will regard the imperfections of the laws with indifference till they experience their effects. What in such men must be attributed to inability or neglect

<sup>1</sup> Foster's Crown Law, Pref. p. 3.

only,



only, may in others, perhaps, deserve the ap-  
 pellation of a breach of trust. Be this as  
 it may, it highly concerns the safety of  
 every individual, as well as the general  
 morality and happiness of the people, that  
 the innocent be protected against unmerited  
 severities, and that the guilty be conducted  
 with certainty to punishments proportionate  
 to their crimes.

These Ends can be attained only when  
 the penal system is good. Under such a  
 system, they who offend against the Laws,  
 and they only, have reason to fear: whilst  
 those happier members of society, who de-  
 serve security, enjoy it in the full perfection  
 to which the rectitude of their conduct hath  
 entitled them.

THE END.

ON PENAL LAW  
 OF THE STATE OF NEW YORK  
 IN SENATE  
 JANUARY 18, 1882  
 REPORT OF THE  
 COMMISSIONERS OF THE  
 DEPARTMENT OF CORRECTIONS  
 IN RESPONSE TO A  
 RESOLUTION PASSED  
 BY THE SENATE  
 MARCH 1, 1881



PRINCIPLES  
 OF  
 PENAL LAW

THE  
 STATE OF NEW YORK

